Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

ROBERT J. MATZ, Individually and on Behalf of All Others Similarly Situated,

Petitioner,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether all terminated plan participants in a qualified employee benefit plan, regardless of vesting status at the time of termination, should be counted to determine whether a partial termination of the plan has occurred.

2. When a regulation is ambiguous or silent as to the question at issue, yet gives the responsible agency broad interpretive powers, and the agency has issued an interpretation of the regulation, whether a court may refuse to consider the agency's interpretation of the regulation, thus abandoning the regulatory deference standards set forth in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997).

3. When both the applicable statute and regulation are silent or ambiguous as to the question at issue and the responsible agency has issued informal interpretations of both the statute and the regulation, should a court apply the standards of judicial deference of both *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001), and *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997), to the agency's interpretations.[1]

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1. If this Court meant for the statutory interpretation standards set forth in *Mead* to apply to an agency's interpretation of its own regulations, then Petitioner respectfully requests that this Petition be granted and that this case be remanded to the Seventh Circuit for its reconsideration of the regulation at issue here. In the event this Court determines *Mead*, and not *Auer*, applies to an agency's interpretation of its own regulation, then Petitioner submits that the IRS' interpretation of the partial termination regulation clearly meets the *Mead* standards because the regulation expressly gives the IRS the authority to decide what facts and circumstances are relevant to the partial termination determination. Reg. § 1.411(d)-2(b)(1).

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Matz petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit, on remand, which is reported at 265 F.3d 572, is reproduced at Appendix ("App.") 1a-7a. This Court's order granting Respondent's Petition for Writ of Certiorari and vacating the Seventh Circuit's initial opinion, which is reported at 121 S. Ct. 2545, is reproduced at App. 8a. The initial opinion of the Seventh Circuit, which is reported at 22 F.3d 971, is reproduced at App. 9a-21a. The November 30, 1998 opinion and order of the district court appears at 1998 WL 851491 and is reproduced at App. 22a-33a.

The Seventh Circuit's order of October 16, 2001, denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* of the second opinion is reproduced at App. 34a-35a.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Seventh Circuit filed its order denying rehearing on October 16, 2001. App. 34a. This Petition is filed within ninety days of that date.

STATUTES AND REGULATIONS

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Internal Revenue Code ("IRC") § 401(a)(7), 26 U.S.C. § 401(a)(7):

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part satisfies the requirements of section 411 (relating to minimum vesting standards).

IRC § 411(d)(3)(A), 26 U.S.C. § 411(d)(3)(A):

> **Termination or partial termination; discontinuance of contributions.** Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that —
>
> > (A) upon its termination or partial termination . . .
>
> the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable. This paragraph shall not apply to benefits or contributions which, under provisions of the plan adopted pursuant to regulations prescribed by the Secretary to preclude the discrimination prohibited by section 401(a)(4), may not be used for designated employees in the event of early termination of the plan.

Employee Retirement Income Security Act ("ERISA") § 3(34), 29 U.S.C. § 1002(34):

> The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, any forfeitures of accounts of other participants which may be allocated to such participant's account.

ERISA § 501(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B):

> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

ERISA § 501(e)(1), 29 U.S.C. § 1132(e)(1):

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) of (7) of subsection (a) of this section.

ERISA § 501(f), 29 U.S.C. § 1132(f):

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant relief provided for in subsection (a) of this section in any action.

Treasury Regulation § 1.401-6(b), 26 C.F.R. § 1.401-6(b):

> *Termination defined.* (1) Whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case . . .
>
> > (2) For purposes of this section, the term termination includes both a partial termination and a complete termination of a plan. Whether or not a partial termination of a qualified plan occurs when a group of employees who have been previously covered by the plan are subsequently excluded from such coverage either by reason of an amendment to the plan, or by reason of being discharged by the employer, will be determined on the basis of all the facts and circumstances . . . [I]f a partial termination of a qualified plan occurs, the provisions of section 401(a)(7) and this section apply only to the part of the plan that is terminated.

Treasury Regulation § 1.411(d)-2(b)(1), 26 C.F.R. § 1.411(d)-2(b)(1):

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of plan amendment or severance by the employer, of a group of employees who have been previously covered by the plan . . . .

STATEMENT OF THE CASE

A. Introduction.

Petitioner asks this Court to resolve the direct conflict between the Circuit Courts concerning an important issue that arises when courts are asked to determine whether a qualified employee benefit plan has been "partially terminated," thus requiring full vesting of the benefits of all affected employees. More importantly, while *United States v. Mead*, 121 S. Ct. 2164 (2001), left intact this Court's rule, most recently set forth in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997), that an agency's interpretation of its own ambiguous or silent regulation is to be given substantial judicial deference by the courts, the Seventh Circuit applied *Mead* so as to abrogate this rule. The Seventh Circuit's decision effectively rejects *Auer* and its principles, and permits courts to set aside an agency's reasonable interpretation of its own regulation, thus allowing litigants and the courts to advance their own interpretation of the agency's regulation.

B. Background Facts.

Petitioner, Robert J. Matz, and other employees of Hamilton Investments, Inc. ("Hamilton"), a subsidiary of Household

International, Inc. ("Household"), lost their jobs and the non-vested portions of their pension plan in September of 1994, when the assets of Hamilton were sold. Household sponsors Respondent, a defined contribution employee pension plan, for both Household's employees and the employees of its subsidiaries, such as Hamilton. Subsequent to the sale of Hamilton's assets, Household, pursuant to a plan of reorganization, proceeded with the sale of several other businesses and the termination of related employees and participants in Respondent.

Respondent is intended to be a qualified profit sharing plan under IRC § 401(a). Household makes matching contributions to Respondent on behalf of those employees who have chosen to participate in Respondent with their own contributions. All contributions by participants to Respondent are completely vested, regardless of the length of time such participants have been employed with Household. However, until September 1995, Household's matching contributions to Respondent on behalf of each participant were vested over a five-year period. During that five-year period, a participant would vest in the matching contributions at the rate of 20% per year. Accordingly, a participant in Respondent would be fully vested after five years of participation. If five years of participation was not achieved by a participant, the unvested portion of Household's matching contributions was forfeited to Respondent and would reduce Household's future contributions to Respondent.

In September 1995, during the period of time that Household was selling off other businesses and terminating a substantial number of employees, Respondent was amended to eliminate the five-year vesting schedule. As a result, all remaining participants in Respondent were fully vested in their respective accounts, including Household's matching contributions to their accounts.

Petitioner participated in Respondent until the time of his termination on September 1, 1994, when Household sold Hamilton's assets. At the time of his termination, Petitioner was 60% vested in the matching contributions made by Household and credited to his account. Petitioner was given $27,914.10, the full amount of his vested account. The remaining unvested portion of Household's matching contributions, $7,289.92, was forfeited back to Respondent.

C. Petitioner's Lawsuit.

Petitioner filed the underlying class action in the United States District Court for the Northern District of Illinois in February 1996, on behalf of himself, and all of those persons similarly situated, pursuant to ERISA §§ 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The district court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and ERISA §§ 502(e)(1) and (f), 29 U.S.C. §§ 1132(e)(1) and (f), without respect to the amount in controversy or the citizenship of the parties.

Petitioner asserted that Household sold Hamilton as part of a stated, overall plan to refocus its business. That business plan also included the sale of Household's residential mortgage business, its mortgage servicing business, its banking business and a life insurance subsidiary. Petitioner alleged that, as a result, a partial termination of Respondent had occurred and, therefore, Petitioner was entitled to the full amount of his pension account.[2]

2. Courts have generally held a "partial termination" of a qualified employee benefit plan only occurs where there has been a significant reduction in plan participants. In determining whether there has been a significant reduction, courts apply the "significant percentage" test. *Kries v. Charles O. Townley, M.D. & Associates, P.C.*, 833 F.2d 74, 79 (6th Cir. 1987). In applying such a test, courts look to see whether a significant percentage of plan participants have been terminated. If so, then the plan is deemed to have been partially terminated and all involuntarily terminated participants become entitled to full vesting of their benefits. *Kries*, 833 F.2d at 79-80.

Petitioner's allegation was based on the specific provision within the documents creating Respondent that states:

> in the case of the termination of [Respondent] by Household International, Inc. . . . or a partial termination of [Respondent] with respect to a group of participants, the account balance of each affected participant shall become 100% vested.

D. The District Court's Rulings In Favor Of Petitioner.

In December 1997, Respondent moved for partial summary judgment to exclude those participants who were terminated after September 1995, when Respondent was amended, from both any partial termination analysis and from the plaintiff class itself. In denying Respondent's motion, the district court held that fully vested plan participants are counted in the partial termination analysis, but that such participants are excluded from the plaintiff class. App. 33a.

Respondent moved again for partial summary judgment on December 31, 1998, on the issue of whether events occurring in multiple plan years can be considered in determining if a partial termination has occurred. The district court denied that motion on September 8, 1999, and held that terminations occurring over multiple plan years may be aggregated for the purpose of the partial termination analysis. App. 21a.

E. Respondent's Interlocutory Appeal To The Seventh Circuit.

On November 30, 1999, the district court granted Respondent's motion to certify the November 30, 1998 and September 8, 1999 orders for interlocutory appeal. The specific questions certified for review by the Seventh Circuit were: (i) whether, for purposes of determining if a partial termination

of Respondent had occurred, fully-vested plan participants should be included in the partial termination analysis, and (ii) whether the partial termination analysis may include terminations that take place over multiple plan years. App. 13a. The Seventh Circuit granted Respondent's request for a permissive, interlocutory appeal of these issues on January 3, 2000. App. 10a.

F. The Seventh Circuit's Initial Opinion In Favor Of Petitioner.[3]

The Seventh Circuit issued an opinion ("First Opinion") affirming both orders of the district court. App. 21a. In the First Opinion, the Seventh Circuit reviewed the partial termination statute and its legislative history as well as the corresponding Treasury Regulation and concluded that both the statute and the regulation were ambiguous as to the standard for determining when a partial termination has occurred. In doing so, the Seventh Circuit specifically noted that "[n]either the statute, its legislative history nor the Treasury Regulation . . . differentiate between vested and non-vested participants." App. 18a.

Because of this silence, the Seventh Circuit next looked to the Second Circuit's description of, and deference to, the Internal Revenue Service's ("IRS") position with respect to the interpretation of both the partial termination statute *and* the partial termination regulation, as set forth in an *amicus curiae* brief submitted by the IRS to the Second Circuit upon that Court's request in *Weil v. Retirement Plan Administrative*

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3. In its First Opinion, the Seventh Circuit also affirmed the district court's ruling that involuntary terminations occurring over multiple plan years may be aggregated for the purpose of determining whether a partial termination has occurred. App. 21a. Because *Mead* did not impact this ruling, the Seventh Circuit reaffirmed this ruling in its Second Opinion. App. 6a-7a.

Committee of the Terson Co., Inc., 933 F.2d 106 (2d Cir. 1991) ("*Weil III*"),[4] and as also set forth in the Internal Revenue Manual ("*Manual*"), Subsection 7753 § 252(7) (1990). A copy of the IRS' *amicus curiae* brief is reproduced at App. 36a-52a. The IRS has interpreted both the partial termination statute *and* regulation to require that all participants — including those fully vested — be counted for purposes of a partial termination analysis. App. 46a; *Manual*, Subsection 7753 § 252(7) (1990). In the brief, the IRS discusses at length the all inclusive language of both the partial termination statute and the regulation, the IRS' interpretation of the statute and regulation, the analysis and rationale underlying the interpretation, the statute's legislative history and purpose, relevant case law and IRS rulings, opinions and publications supporting the interpretation. App. 43a-50a.

Because the IRS had issued its interpretation of both the partial termination statute and regulation, the Seventh Circuit, in its First Opinion, limited its analysis to whether the IRS' interpretation was reasonable. App. 18a. The Seventh Circuit cited to the *Weil III* Court's finding that the IRS' interpretation was reasonable, stated that the partial termination regulation *supports* such a finding by virtue of its all inclusive language, and held that the IRS' interpretive rule was reasonable, and therefore, fully vested plan participants are to be included in the partial termination analysis.[5] App. 18a-19a. On November

4. The IRS was not a litigant in *Weil III*. Rather, the Second Circuit specifically requested that the IRS submit an *amicus curiae* brief to provide the Court with the IRS' interpretation, and analysis and reasoning of that interpretation, of the partial termination statute and partial termination regulation. *Weil III*, 933 F.2d at 107.

5. The *Weil III* Court deferred to the IRS' interpretation of the partial termination statute pursuant to *Chevron U.S.A., Inc. v. Natural*

(Cont'd)

6, 2000, the Seventh Circuit denied Respondent's petition for rehearing with suggestion for rehearing *en banc*.

G. Respondent's Petition For A Writ Of Certiorari.

After the Seventh Circuit denied Respondent's petition for rehearing with suggestion for rehearing *en banc*, Respondent filed a Petition for a Writ of Certiorari with this Court, which Petition was granted without opinion. App. 8a. In its order, this Court vacated the First Opinion and remanded the case for further consideration in light of *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001). App. 8a.

H. The Seventh Circuit's Second Decision.

On remand from this Court, the issue before the Seventh Circuit was whether this Court's analysis in *Mead* for determining the deference to be accorded an agency's informal statutory interpretation either (i) made the Seventh Circuit's deference to the IRS' interpretation of the partial termination statute inappropriate or misplaced, or (ii) changed the standards for determining whether deference to an agency's interpretation of its ambiguous regulation is warranted.

In its Second Opinion, the Seventh Circuit stated that it had given *Chevron* deference to the IRS interpretation of the partial termination statute and regulation under the stricter pre-*Mead* standards.[6] App. 3a. Despite apparently giving *Chevron*

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Res. Def. Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984). *Weil III*, 933 F.2d at 108, 110. In its First Opinion, the Seventh Circuit apparently agreed with the *Weil III* Court's decision to so defer to the IRS' interpretation. App. 3a-4a.

6. Petitioner submits that if the Seventh Circuit gave *Chevron* deference to the IRS' interpretation of the partial termination statute

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deference to the IRS' interpretation of the partial termination statute under the stricter pre-*Mead* standards, the Seventh Circuit found that the IRS' interpretation of the partial termination statute was an informal agency pronouncement not entitled to *Chevron* deference, but was instead afforded only deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944), based upon the interpretation's thoroughness, validity, consistency and persuasiveness. App. 5a. Thus, it appears that the Seventh Circuit has read *Mead* in such a manner as to restrict *Chevron* deference, as opposed to liberalizing it, which appears to be at odds with the intent of the *Mead* Court.

The Seventh Circuit then opined that the IRS' position on the partial termination statute, which the Court had previously found to be reasonable under *Chevron*, is unpersuasive. App. 6a. The Seventh Circuit held that "since we indicated [in the First Opinion] that if we were writing on a blank slate we would have held differently, we now adopt a rule that only non-vested participants should be counted in determining whether partial termination of a pension plan has occurred." App. 6a. In so ruling, the Seventh Circuit rejected the positions advocated by the Petitioner, Respondent and the IRS,[7] and instead adopted a

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under the stricter judicial deference standards in place at the time of the First Opinion, then in the post-*Mead* Second Opinion, *Chevron* deference should have also been given to the IRS' interpretation. At a minium, the Seventh Circuit should have deferred to the IRS' interpretation of the partial termination regulation as required by this Court in *Auer*. (*See* II, *infra*, at 17-26.)

7. Respondent takes the position that involuntarily terminated fully vested plan participants should be excluded from in the numerator, but included in the denominator, of the partial termination analysis. Petitioner and the IRS take the position that such participants should be included

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position supported only by *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991), a district court case issued prior to the publication of the IRS' position in *Weil III*.

Furthermore, in the Second Opinion, the Seventh Circuit failed to address or even mention that the IRS has also interpreted the partial termination regulation, which regulation the Seventh Circuit stated was silent as to whether fully vested participants are included in the partial termination analysis. App. 6a, 18a. The Seventh Circuit gave no deference to the IRS' interpretation of the ambiguous partial termination regulation, which deference is mandated by this Court's holding in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997): if a regulation is ambiguous, a court must defer to an otherwise non-binding agency interpretation of that regulation unless the interpretation is plainly erroneous or inconsistent with the regulation.

In failing to apply the judicial deference standards set forth in *Auer* to the IRS' interpretation of its own ambiguous regulation, and instead only applying the standards of *Mead*, the Seventh Circuit misreads *Mead* as implicitly overruling *Auer*. Further, this failure to defer to the IRS' interpretation of the partial termination regulation also ignores the express terms of the regulation which provides that "[w]hether or not a partial termination of a qualified plan occurs . . . *shall be determined by the Commissioner*. . . ." Reg. § 1.411(d)-2(b)(1) (emphasis added).

(Cont'd)
in both the numerator and the denominator. The Seventh Circuit took neither of these positions, but instead fashioned it's own position that fully vested plan participants are excluded from both the numerator and the denominator. App. 7a.

On September 21, 2001, Petitioner filed a Petition for Rehearing With Suggestion for Rehearing *En Banc*, which the Seventh Circuit denied on October 16, 2001. App. 34a.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION THAT FULLY VESTED PLAN PARTICIPANTS ARE NOT INCLUDED IN THE PARTIAL TERMINATION ANALYSIS DIRECTLY CONFLICTS WITH A SECOND CIRCUIT DECISION WHICH HOLDS THE OPPOSITE.

The issue is whether fully vested plan participants who have been involuntarily terminated from plan participation are to be counted to determine if a qualified plan has been partially terminated. The IRS' long-standing rule, which has been consistently applied by the IRS since 1990, is that all plan participants, regardless of vesting status, are counted to determine whether a partial termination has occurred. *Weil III*, 933 F.2d at 110; *Manual*, Subsection 7753 § 252(7) (1990). Generally, where there is a 20% or more reduction in plan participation, a partial termination of the plan will be deemed to have occurred, and the affected employees (*i.e.*, the non-vested participants) are entitled to full vesting of their account balances. *Halliburton Co. v. Comr.*, 100 T.C. 216, 237 (1993). Thus, the important issue of which participants are to be counted in the partial termination could profoundly influence whether the plan experienced a reduction of 20% or more in participation and whether those affected participants receive full vesting of their account balances as required by law. IRC § 411(d)(3)(A).

In its Second Opinion, the Seventh Circuit decided that "only non-vested participants should be counted in determining whether partial termination of a pension plan has occurred" and

expressly rejected the IRS' long-standing and consistently applied interpretation of both the partial termination statute and partial termination regulation (*i.e.*, all plan participants, regardless of vesting status, are counted in the partial termination analysis). App. 6a. Now, within the geographical area covered by the Seventh Circuit, a qualified plan is allowed to disregard involuntarily terminated fully vested plan participants when determining whether it has been partially terminated.

The Second Circuit has reached the direct opposite conclusion. In *Weil III*, the Second Circuit held that fully vested plan participants who were involuntarily terminated from future participation *should* be counted in determining whether partial termination of a pension plan has occurred. *Weil III*, 933 F.2d at 110-11. In reaching this decision, the Second Circuit expressly relied upon and deferred to the IRS' interpretation in an *amicus curiae* brief submitted by the IRS to the Second Circuit.[8] Thus, within the geographical area covered by the Second Circuit, a qualified plan is *not* allowed to disregard involuntarily terminated fully vested plan participants when determining whether it has been partially terminated.

Obviously, there is now a direct conflict between the Seventh and Second Circuits regarding the appropriate test to be used to determine whether a qualified plan has been partially terminated. Significantly, there is now a direct conflict between the Seventh Circuit and the IRS, the agency responsible for enforcing the partial termination statute and regulation, and the agency which has express authority under the partial termination regulation to determine what facts and circumstances are relevant to the partial termination analysis. Reg. § 1.411(d)-2(b)(1). The purpose of federal law is to establish uniform federal standards. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9,

8. The *Weil III* Court deferred to the IRS' interpretation under the stricter pre-*Mead* standards. Presumably, the *Weil III* Court would also defer to the IRS' interpretation under the more relaxed *Mead* standards.

107 S. Ct. 221 (1987). Because ERISA governs *all* qualified employee benefit plans, regardless of where the employer or participants are located, uniformity is particularly important with respect to issues arising under ERISA because of its nationwide impact. *Patterson v. Shumate*, 504 U.S. 753, 765, 112 S. Ct. 2242 (1992). In fact, Congress intended for the federal courts to develop a federal common law for ERISA matters. *Shaw v. Delta Airlines*, 463 U.S. 85, 105, 103 S. Ct. 2890 (1983).

Because of the conflicting rulings on whether fully vested plan participants are included in the partial termination analysis, qualified plans with participants in the geographical areas covered by *both* the Seventh and Second Circuits face the ultimate dilemma – which partial termination standard to apply. Even if a qualified plan only has participants in the Seventh Circuit, the problem still remains because the plan faces a different standard being applied by the IRS. Furthermore, this conflict between Circuits and the IRS encourages participants to "forum shop."

For example, does the qualified plan make two partial termination analyses, one for the participants covered by the Seventh Circuit and one for the participants covered by the Second Circuit, thus subjecting itself to possible discrimination claims? Or does the qualified plan make only one partial termination analysis, thus subjecting itself to possible claims for benefits from the participants in another Circuit applying that Circuit's law? Does a qualified plan which excludes fully vested participants from the analysis and finds that no partial termination has occurred open itself up to a claim by the IRS that, in fact, a partial termination has occurred because the IRS includes fully vested participants? Does a qualified plan then face the loss of its qualified status?

Employers and qualified plans alike will continue to be faced with conflicting directives with serious consequences. Petitioner respectfully submits that these are questions which should be addressed by uniform standards in the federal courts, not by employers on a case-by-case basis. Thus, review by this Court of the Second Opinion is necessary, and this Petition should be granted.

II. THE SEVENTH CIRCUIT'S DECISION TO GIVE NO DEFERENCE TO THE IRS' INTERPRETATION OF ITS AMBIGUOUS REGULATION DIRECTLY CONFLICTS WITH SUPREME COURT LAW AND LAW OF OTHER CIRCUIT COURTS.

A. In Applying Mead To The IRS' Interpretation Of The Partial Termination Regulation, The Seventh Circuit Has Abandoned *Auer*.

In its Second Opinion, the Seventh Circuit focused solely on the statutory aspect of this case under *Mead* and failed to consider or even address the regulatory aspect of this case. The regulatory aspect of this case is governed by *Auer*, which provides that an agency's interpretation of an ambiguous or silent regulation is entitled to significant judicial deference. *Auer*, 519 U.S. at 461, 117 S. Ct. 905. Despite this controlling law, the Seventh Circuit failed to analyze the IRS' interpretation of the partial termination *regulation* under the judicial deference standards set forth in *Auer*, apparently abandoning this case.[9]

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9. The *Mead* Court did not overrule *Auer* or otherwise indicate it was no longer good law. "It is the Supreme Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275 (1997). "An intermediate appellate court has no authority to abandon governing case law from the Supreme Court." *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 885 (7th Cir. 2001).

Instead, the Seventh Circuit focused solely on whether the IRS' interpretation was entitled to either *Chevron* or *Skidmore* deference. Although the Seventh Circuit had, in the First Opinion, afforded the IRS' interpretation *Chevron* deference under the stricter pre-*Mead* standards of the Seventh Circuit, in its Second Opinion, the Seventh Circuit found that the IRS' interpretation of the partial termination statute was not formal enough to warrant the deference described in *Chevron*. App. 4a-5a. Petitioner respectfully submits that this failure to give *Chevron* deference under the less stringent standards set by *Mead* is at odds with the purpose of *Mead*: to allow *Chevron* deference to be given to a broader range of agency actions and decisions.

In the Second Opinion, after concluding that *Chevron* did not apply, the Seventh Circuit held that, pursuant to *Skidmore*, the IRS' interpretation was entitled to "respect only to the extent those interpretations have the power to persuade." App. 5a. Despite the fact that the partial termination regulation *expressly* gives the IRS the power to determine what facts and circumstances are relevant in determining whether a partial termination of the plan has occurred, Reg. § 1.411(d)-2(b)(1), the Seventh Circuit found itself to be unpersuaded by the IRS' interpretation. Thus, in its Second Opinion, the Seventh Circuit gave the IRS' interpretation absolutely no deference. App. 6a.

The Seventh Circuit should not, however, have stopped its analysis at *Skidmore*. In doing so, the Seventh Circuit failed to take one additional and necessary step and consider the IRS' interpretation of the ambiguous partial termination ***regulation*** (as opposed to the partial termination statute), which interpretation is set forth in both the Manual and the *amicus curiae* brief submitted by the IRS to the Second Circuit in *Weil III*. The IRS has interpreted the partial

termination regulation to require the inclusion of all plan participants, regardless of vesting status, in the partial termination analysis. App. 44a-46a; *Manual*, Subsection 7753 § 252(7) (1990). Clearly, this determination is within the broad authority given to the IRS by the partial termination regulation. Reg. § 1.411(d)-2(b)(1).

The Seventh Circuit did not, however, analyze the IRS interpretation in light of the silent partial termination regulation, but instead treated the statutory and regulatory aspects as one and the same and *only* analyzed the IRS' interpretations in light of *Mead*, *Chevron* and *Skidmore*. Those decisions, however, apply only to an agency's interpretation, whether formal or informal, of an ambiguous statute; they do not apply to an agency's interpretation of its own ambiguous regulation. *Mead*, 121 S. Ct. at 2171, 2181; *Chevron*, 476 U.S. at 842-43, 104 S. Ct. 2778; *Skidmore*, 323 U.S. at 140, 65 S. Ct. 161. Indeed, it is clear that the Seventh Circuit treated statutory deference and regulatory deference interchangeably. For example, in its analysis of case law, the Seventh Circuit fails to distinguish between statutory and regulatory interpretations, and between deference give under *Chevron* and deference given under *Auer*. App. 4a-5a. By applying the *Mead* standards to an agency's interpretation of an ambiguous regulation, Petitioner respectfully submits that the Seventh Circuit has misread *Mead*, and in doing so, has abandoned *Auer*.[10]

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10. The Seventh Circuit's decision to formulate its own rule rather than apply the *Auer* standard to the IRS' interpretation of its ambiguous regulation underscores Justice Scalia's concern, articulated in his *Mead* dissent, that the *Mead* approach "will have a perverse effect on the rules that do emerge, given the principle (which the Court leaves untouched today) that judges must defer to reasonable agency interpretations of their own regulations." *Mead*, 121 S. Ct. at 2181.

The Seventh Circuit's clear failure to distinguish between the deference given to an agency's interpretation of an ambiguous statute, as opposed to an ambiguous regulation, significantly disrupts the administrative process and conflicts with the decisions of this Court and the decisions of other circuit courts.

B. In Failing To Defer To The IRS' Interpretation Of Its Ambiguous Regulation, The Seventh Circuit's Decision Directly Conflicts With Decisions Of This Court.

Under the law set by this Court, it is well-settled that an agency's interpretation of an ambiguous *regulation* is subject to a very different set of standards of judicial deference than an agency's interpretation of an ambiguous *statute*. *Mead*, 121 S. Ct. at 2181; *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S. Ct. 1655 (2000). By refusing to apply the regulatory standards to the IRS' interpretation of the partial termination regulation, the Seventh Circuit's decision in its Second Opinion directly conflicts with decisions of this Court. Most recently, in *Auer*, this Court held that an agency's interpretation of its own regulation, even if that interpretation is set forth in an informal document such as an *amicus curiae* brief or agency manual, is entitled to substantial deference when the regulation is ambiguous as to the question at issue. *Auer*, 519 U.S. at 461, 117 S. Ct. 905.

This is consistent with this Court's long held recognition of an agency's power and authority to interpret its own ambiguous regulations. *See, Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381 (1994) (agency's reasonable, consistently-held interpretation of its own regulation is entitled to deference); *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183,

189-90, 112 S. Ct. 551 (1991) (same); *Stinson v. United States*, 508 U.S. 36, 44, 113 S. Ct. 1913 (1993) (if an agency's interpretation of its own regulation does not violate the Constitution or a federal statute, then it must be given controlling weight unless it is plainly erroneous).

In order to guarantee that the "rules will be written by 'masters of the subject' . . . who will be responsible for putting the rules into effect," *United States v. Moore*, 95 U.S. 760, 763, 24 L. Ed. 588 (1887), this Court grants "substantial judicial deference" to the IRS' reasonable, longstanding interpretation of its own regulations. *United States v. Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1444 (2001). Indeed, as stated by this Court, the IRS' considered view on the interpretation of its regulations is generally entitled to considerable deference. *Jewett v. Com'r*, 455 U.S. 305, 318, 102 S. Ct. 1082 (1982). The rationale for the deference given to an agency's interpretation of its own ambiguous regulation is that the agency, and not the court, is in the best position to know what was intended by a regulation the agency drafts, implements and enforces. *Thomas Jefferson University*, 512 U.S. at 512-13, 114 S. Ct. 2381.

The Seventh Circuit's decision in the Second Opinion gives absolutely no deference or consideration to the IRS' interpretation of the ambiguous partial termination regulation or the IRS' expertise in the area of qualified employee benefit plans. This complete lack of deference is in direct conflict to this Court's well-established rule that an agency's reasonable and consistently held interpretation of its own ambiguous regulation is controlling and should be given substantial deference. *Auer*, 519 U.S. at 461, 117 S. Ct. 905. Petitioner respectfully submits that the Petition should be granted because the Second Opinion decides a federal question in a manner that is in direct conflict with this Court's opinions in *Cleveland*

Indians Baseball Co., *Auer*, *Thomas Jefferson University*, *National Center for Immigrants' Rights, Inc.*, *Stinson* and *Jewett*.

C. The Seventh Circuit's Lack Of Deference To The IRS' Interpretation Of The Regulation At Issue Directly Conflicts With The Decisions Of Other Circuit Courts.

Other circuit courts have recognized the validity of *Auer* and its controlling weight. The Seventh Circuit's failure, in its Second Opinion, to give deference to the IRS' reasonable, consistently-held interpretation of its ambiguous partial termination regulation is directly at odds with the decisions of these courts.[11]

For example, in *American Express Co. v. United States*, 262 F.3d 1376 (Fed. Cir. 2001), a post-*Mead* case, the Federal Circuit was faced with the question of what deference, if any, should be given to the IRS' interpretation of its own Revenue Procedure when the relevant regulation was silent as to the question at issue. The taxpayer challenged the IRS' reading of the Revenue Procedure and argued that no deference was due under *Chevron*, *Mead* or *Skidmore*. The Federal Circuit disagreed and stated that "substantial deference is paid to an agency's interpretations reflected in informal rulings," and that because the IRS' "interpretation [at issue] is reasonable, it attracts substantial judicial deference. . . ." *Id.* at 1383-84. Thus, the Court deferred to the IRS' interpretation. *Id.* at 1384.

Similarly, in *Bigelow v. Dept. of Defense*, 217 F.3d 875 (D.C. Cir. 2000), the District of Columbia Circuit was faced

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11. Because a number of circuit courts have issued decisions upholding *Auer* and its predecessors in numerous cases, Petitioner merely submits a sampling of those cases here and does not intend to identify each and every case where a circuit court recognized and followed *Auer*.

with the question of what deference, if any, should be given to an agency's interpretation of an ambiguous regulation which is advanced in the agency's litigation brief. The *Bigelow* Court held that despite the fact that the agency's position was advanced only in a legal brief, it was still entitled to deference under *Auer* because there was no reason to suspect the interpretation did not reflect the agency's fair and considered judgment. Specifically, the Court stated that "we have no reason to suppose that the interpretation of the regulations set forth in the [brief] is anything other than [the agency's] position. And we have been pointed to no past practices or pronouncements that are inconsistent with the [agency's] current interpretation." *Id.* at 878. Thus, the Court upheld the agency's interpretation, even though it was first advanced in litigation.

The Second Circuit has also addressed the issue of when deference is due an agency's interpretation of its own regulation. In *Esden v. Bank of Boston*, 229 F.3d 154 (2d. Cir. 2000), vested retirement plan participants filed a class action against the plan administrator under ERISA contending that the administrator had miscalculated the benefits due the participants who elected to receive a lump-sum distribution. The IRS, in an IRS Notice, had issued its interpretation of how the existing regulatory scheme regarding lump-sum distributions applied to the type of plan at issue. *Id.* at 169. Addressing a challenge to the IRS' regulatory interpretation, the Second Circuit stated that it is "well-settled that an agency's consistently held interpretation of its own regulation is entitled to deference" and that the interpretation "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id* at 168. Because the *Esden* Court found the IRS' interpretation both reasonable and consistently held, it found that the interpretation was entitled to deference under *Auer* regardless of its form or manner of publication. *Id.* at 169.

In addressing the issue, the Fourth Circuit stated that under *Auer*, an agency's regulatory interpretation proffered in the form of an *amicus curiae* brief is entitled to deference as long as there is no reason to suspect it is a post hoc rationalization to defend past agency action against attack. *Jones v. American Postal Workers Union National*, 192 F.3d 417, 427 (4th Cir. 1999). Likewise, in *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776, 782 (6th Cir. 2001), the Sixth Circuit expressly recognizes that under *Auer*, where the regulation at issue is ambiguous, the agency's regulatory interpretation is controlling unless plainly erroneous or inconsistent with the regulation.

Both the Ninth and Eleventh Circuits have addressed the issue of regulatory deference where — like here — neither the statute nor the regulation answered or provided guidance on the issue in question. In both cases, the Circuit Courts deferred to the agency's informal interpretation. In *Foothill Presbyterian Hospital v. Shalala*, 152 F.3d 1132, 1133 (9th Cir. 1999), the plaintiff made a request for reimbursement under the Medicare statute. When the request was denied as untimely, the plaintiff sued the Secretary of Health in an attempt to obtain reimbursement. Neither the Medicare statute nor the controlling regulation answered the question of whether the plaintiff's request was timely. *Id.* at 1134-35. The Secretary of Health had informally interpreted the regulation in such a manner that would deny plaintiff its reimbursement request. Upon the plaintiff's challenge to the interpretation, the Ninth Circuit stated that if the regulation is silent or ambiguous "we will defer to the agency's interpretation unless an alternative reading is compelled by the plain language of the regulation." *Id.* at 1134. The Ninth Circuit then analyzed the Secretary's interpretation in light of the regulatory language and found the interpretation to be both reasonable and consistent with the regulatory language and scheme. *Id.*

Likewise, in *Falken v. Glynn County, Georgia*, 197 F.3d 1341 (11th Cir. 1999), both the relevant statute and regulation were silent on the question at issue. In *Falken*, dual function firefighters/emergency medical services (EMS) workers brought suit against the county seeking overtime under the Fair Labor Standards Act ("FLSA"). The county responded that it was entitled to the FLSA's partial overtime exemption for employees engaged in fire protection activities. *Id.* at 1344. The FLSA does not define "fire protection activities." Although the Department of Labor ("DOL"), the agency charged with implementing the FLSA, had issued notice and comment regulations defining "fire protection activities," the regulations did not answer the precise question at issue in *Falken*. *Id.* at 1345-47.

The DOL, however, had issued an opinion letter setting forth certain criteria to be used to determine if dual function firefighters/EMS workers fit within the regulatory definition of "fire protection activities." *Id.* at 1349. Citing *Auer*, the Eleventh Circuit stated that "we must defer to the DOL's interpretation of its FLSA regulations unless the interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Id.* at 1350. Because the Court found that the DOL's interpretation was a permissible interpretation of the regulation and the FLSA, the statute at issue, it held that the criteria set forth in the DOL opinion letter governed the fire protection activities exemption to dual function firefighters/EMS workers. *Id.* The Court then remanded the case to the district court for further proceedings regarding the application of the DOL criteria. *Id.* at 1353.

Cardinally, both the Ninth and the Eleventh Circuits have found *Auer* applicable even in circumstances where both the relevant statute and regulation are silent or ambiguous as to the issue in question. *Foothill Presbyterian Hospital*, 152 F.3d at 134-35; *Falken*, 197 F.3d at 1345-47. Indeed, since a court will look to regulations and regulatory interpretations *only* when the

relevant statute is silent or ambiguous, *Auer* would be moot if it were to apply only when the regulation, but not the statute, is ambiguous or silent. Clearly, since *Mead* did not overrule *Auer* in any respect, this cannot be the case, and *Auer* should continue to apply post-*Mead*.

The Seventh Circuit's apparent refusal to apply *Auer* after *Mead* to an agency's interpretation of its own ambiguous regulation directly contradicts the circuit court cases cited, *supra*, particularly the Ninth Circuit's decision in *Foothill Presbyterian Hospital* and the Eleventh Circuit's decision in *Falken*. On this issue, the Seventh Circuit appears to stand alone. Petitioner respectfully submits that this Petition should be granted in order to clarify the law as to the proper deference to be given to an agency's interpretation of its own ambiguous regulation and to bring uniformity to the circuit courts on this matter.

III. THE SEVENTH CIRCUIT INCORRECTLY DECIDED AN IMPORTANT QUESTION INVOLVING THE INTERPLAY BETWEEN STANDARDS OF JUDICIAL DEFERENCE UNDER *MEAD* AND THOSE UNDER *AUER*, WHICH QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case involves the important and recurring interplay between an agency's informal interpretation of a statute and an agency's informal interpretation of its own regulation. Federal agencies are involved in virtually all aspects of Americans' business and financial life, and are constantly issuing rulings, interpretations, opinions and regulations. Thus, the interplay between an agency's informal interpretation of statutes and regulations is of obvious and constant importance to courts, litigants and agencies. This Court has not yet addressed the subject of what type of deference is appropriate when an agency

has issued informal interpretations of both an ambiguous statute *and* an ambiguous regulation. Petitioner submits that litigants, courts and federal agencies need the prompt assistance of this Court to answer the important questions of judicial deference presented here.

An agency's informal interpretation of an ambiguous statute is given substantial judicial deference under *Chevron* if that interpretation meets the standard articulated in *Mead*: administrative implementation of a statute qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and that the agency interpretation claiming deference was promulgated in an exercise of that authority. *Mead*, 121 S. Ct. at 2171. Absent *Chevron* deference, an agency's interpretation of a statute it administers is entitled to respect commensurate with its degree of persuasiveness. *Mead*, 121 S. Ct. at 2175. The *Mead* Court affirmed the *Skidmore* Court's recognition that there are degrees of deference to be accorded an agency interpretation depending on the persuasiveness of the agency's position. *Mead*, 121 S. Ct. at 2172; *Skidmore*, 323 U.S. at 140, 65 S. Ct. 161. Thus, under *Skidmore*, the amount of deference given depends entirely on whether a court is "persuaded" by the agency's interpretation. As this Court is undoubtedly aware, an agency's power of persuasion, and a court's willingness to be persuaded, are widely divergent. In all likelihood, there will be substantial differences among circuits regarding the deference given to various agency interpretations of ambiguous statutes.

On the other hand, an agency's informal interpretation of its own ambiguous regulation is given much greater deference than that afforded under *Mead* and *Skidmore*. Specifically, an agency's informal interpretation of an ambiguous regulation — regardless of the interpretation's form (*i.e.*, agency manual, *amicus curiae* brief, etc.) — is given controlling weight and

should be deferred to unless plainly erroneous or inconsistent with the regulation at issue. *Auer*, 519 U.S. at 461, 117 S. Ct. 905. Thus, under *Auer*, an agency's interpretation of its own regulation will generally be upheld, and a litigant would have a much more difficult time advancing his or her own regulatory interpretation. Because the agency is interpreting a regulation it promulgated after considered review and analysis of how best to implement the statute upon which the regulation is based, there will *not*, in all likelihood, be substantial differences among circuits regarding the deference given to an agency's interpretation of its own ambiguous regulation.

The question then becomes what standards apply when the agency has issued an informal interpretation of *both* an ambiguous statute *and* an ambiguous regulation. Since a court will only look to statutory and regulatory interpretations when the relevant statute is silent or ambiguous, *Auer* must be applicable in circumstances where both the relevant statute and relevant regulation are silent or ambiguous as to the issue in question. In such instances, the agency often issues an interpretation which can fairly be called a statutory *and* regulatory interpretation. Clearly, *Chevron, Mead, Skidmore* and *Auer* must be read together in a coherent manner so as not to render *Auer* moot, particularly where — as here — the controlling regulation gives the agency the express authority to interpret the regulation.

In order to do so, Petitioner submits that (i) *Chevron,* (ii) *Mead* and *Skidmore* and (iii) *Auer* should be applied in a three step process. First, if the statute is ambiguous and the agency has issued an interpretation of the statute, then it should be determined whether the interpretation is formal or otherwise carries the "force of law." If so, then the interpretation should be given *Chevron* deference. Second, if the statutory interpretation is not deserving of *Chevron* deference, then it

should be determined whether the interpretation should be given *Skidmore* deference. If *Skidmore* deference is given, then the analysis should stop there. However, if *Skidmore* deference is not given and the agency has issued an interpretation of its ambiguous or silent regulation, then the court must take the third step and apply *Auer*, which step the Seventh Circuit failed to take here.

The adoption of this three-step process, or any other clarification by this Court of the interrelationship between an agency's statutory and regulatory interpretations, would ensure that the federal courts are consistent in their treatment of an agency's statutory and regulatory interpretations and that agency interpretations are accorded substantially the same amount of deference by the courts. Correspondingly, litigation surrounding an agency's interpretation of a statute and a regulation would be greatly reduced.

On the other hand, if this Court does not clarify this issue, several problems result. First and foremost, the lack of clarification would allow future litigants to challenge virtually every formal or informal agency interpretation of its own regulation by asserting that the *litigant's* reading of the regulation is more reasonable than the agency's and should control. Every agency decision would be required to be reviewed on a post hoc basis. Clearly, this is not consistent with *Auer* or *Mead*, where, in his dissent, Justice Scalia's stressed that "judges must defer to reasonable agency interpretations of their own regulations." *Mead*, 121 S. Ct. at 2181. Notably, the majority did not disagree with Justice Scalia on this point.

Second, federal agencies would be faced with widely divergent opinions regarding the deference given to their statutory and regulatory interpretations. Thus — as in this case here — in one jurisdiction, the agency's interpretation is followed, and in another jurisdiction, a different interpretation

of the regulation could be followed. Multiple rules could develop. Finally, refusing to apply *Auer* to an agency's interpretation of a regulation where the agency has also issued a statutory interpretation will encourage a litigant to "forum shop" for the interpretation the litigant seeks depending on the type of deference the litigant desires. By combining *Chevron*, *Mead*, *Skidmore* and *Auer* into one process, these problems are eliminated.

In failing to recognize or address the interplay between an agency's statutory and regulatory interpretations, the Seventh Circuit erred on an important issue of law. Petitioner respectfully submits that this Petition should be granted in order for this Court to answer the important questions of judicial deference presented here.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED SEPTEMBER 7, 2001

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1109

ROBERT J. MATZ, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 1095 — **Joan B. Gottschall**, *Judge*.

On Remand From
The United States Supreme Court

SUBMITTED JULY 25, 2001 — DECIDED SEPTEMBER 7, 2001

Before BAUER, COFFEY, and KANNE, *Circuit Judges*.

Appendix A

BAUER, *Circuit Judge*. Robert J. Matz filed an ERISA action, claiming entitlement to benefits as a result of a partial termination of a retirement benefit plan. The district court held that in determining whether partial termination occurred: (1) both vested and non-vested plan participants should be counted, *see Matz v. Household Int'l Tax Reduction Inv. Plan*, 1998 WL 851491, *5 (N.D. Ill. Dec. 1, 1998); and (2) multiple plan years could be aggregated, *see* 1999 WL 754659, *6 (N.D. Ill. Sept. 9, 1999). The Plan contested the district court's decisions on interlocutory appeal, and in 227 F.3d 971 (7th Cir. 2000), we affirmed. The Plan petitioned for writ of certiorari, which the Supreme Court granted, thereby vacating and remanding the case to us for further consideration in light of *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001). On remand, we are faced with the question of to what extent we must defer to the interpretation of "partial termination" by the IRS found in an amicus brief, which is one of the agencies responsible for administering the partial termination statute.

In *Mead*, the Supreme Court tried to delineate levels of judicial deference owed to actions by administrative agencies. *See id.* at 2176. The Court held that *Chevron* deference is mandatory when Congress has expressly or implicitly indicated that it intended an agency to speak with the force of law on a matter, and the agency's position on that matter is reasonable. *See id.* at 2171-72. The Court explained that Congress generally indicates its intention "when it provides for a relatively formal administrative procedure," such as "notice-and-comment rulemaking or formal adjudication." *Id.* at 2172-73. However, the Court left open the possibility that *Chevron* deference may be appropriate in some instances

even without such formality, although it did not clearly outline these instances. *See id.* at 2173.

In delineating this spectrum of deference, the Court confirmed its holding in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . ." *Id.* at 2175 (quoting 323 U.S. at 139). The Court instructed that determining whether *Skidmore* deference is owed turns on the " 'thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " *Id.* at 2172 (quoting *Skidmore*, 323 U.S. at 140). Generally, pursuant to *Skidmore* deference, an agency's position may be accorded respect depending on its persuasiveness. *See id.* at 2175-76.

In our first opinion in this case we echoed the district court's sentiment that if we were writing on a blank slate we would be inclined to hold that only non-vested participants ought to be counted in determining whether partial termination occurred. However, we felt constrained by *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) to defer to the IRS' reasonable interpretation of the partial termination statute. In taking this position, we mimicked the reasoning in *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106 (2d Cir. 1991). In *Weil*, the Second Circuit asked the IRS to submit an *amicus* brief regarding the meaning of "partial termination." 933 F.2d at 107. Supported by Revenue Rulings and its position in the Plan

Termination Handbook contained in the Internal Revenue Manual, the IRS submitted its interpretation that " 'all terminated participants, both vested and non[-]vested, should be counted in determining whether a partial termination has occurred.' " *Id.* The *Weil* panel deferred to the IRS' offered position in the amicus brief pursuant to *Chevron*. And, in our first opinion in this case, we deferred to the *Weil* court's deference.

We now hold that the IRS' position in the *amicus* brief was an informal agency policy pronouncement not entitled to *Chevron* deference. *See Callaway v. C.I.R.*, 231 F.3d 106, 132-33 (2d Cir. 2000) (following *Auer v. Robbins*, recognizing that the court had previously afforded *Chevron* deference to an agency's position in an *amicus* brief, but holding that the agency's position in the brief was inconsistent with positions it had previously taken); *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 365 (4th Cir. 2000) (holding that the Secretary of Labor's interpretation of the Fair Labor Standards Act urged in an *amicus* brief was not entitled to *Chevron* deference); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) (discussing *Auer* and *Chevron* regarding the amount of deference an *amicus* brief is due); *Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 875 (7th Cir. 1999) (same); *but see Auer v. Robbins*, 519 U.S. 452, 462 (1997) (affording *Chevron* deference to the Secretary of Labor's interpretation of the Fair Labor Standards Act in its amicus brief because it was not a *post hoc* rationalization and reflected the agency's fair and considered judgment); *Jones v. American Postal Workers Union*, 192 F.3d 417, 427 (4th Cir. 1999) (relying on *Auer* to hold that the EEOC's interpretation of Title VII in its *amicus* brief was entitled

to *Chevron* deference because it was not a *post hoc* rationalization and reflected the agency's fair and considered judgment, and was a valid interpretation). Although the Supreme Court indicated in *Mead* that *Chevron* deference may apply to interpretations developed from less formal rulemaking procedures, it did not expressly outline when this would be the case. The IRS' position in the *amicus* brief was not born from a formal policymaking procedure. We do not believe that a position set forth in an *amicus* brief, supported by some Revenue Rulings and an agency manual are formal enough to warrant Chevron treatment. In *Mead*, the Court declined to give *Chevron* deference to a tariff classification ruling issued by the United States Customs Service. 121 S. Ct. at 2174. The Court explained that deference was not due because Congress did not indicate that it meant to delegate authority to Customs to issue classification rulings with the force of law, Customs did not engage in notice-and-comment practice when issuing the rulings, and they were not binding on third parties. *See id.* We do not consider a position in an *amicus* brief to be more deserving of *Chevron* deference than a tariff classification ruling. Upon reading *Mead*, we find that a litigation position in an *amicus* brief, perhaps just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals, and enforcement guidelines, *see id.* at 2175, are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*.

Therefore, since we are not bound by the IRS' position under *Chevron*, any deference we afford it under *Skidmore* depends on its thoroughness, validity, consistency, and persuasiveness. As noted, in our first opinion, although we

found the IRS' position reasonable under *Chevron*, we also found it unpersuasive. As we noted, the meaning of "partial termination" is unclear because the statutory language is ambiguous, the Treasury Regulation is not helpful, the statutory framework offers no assistance, and the legislative history provides little more guidance. *See Matz*, 227 F.3d at 974. Thus, we looked to the statute's purposes, which are to protect employees' legitimate expectation of pension benefits, and to prevent employers from abusing pension plans to reap tax benefits. *See id.* at 975. We agree with the Plan that counting vested participants "would further neither of these purposes." *Id.* "Vested participants do not need further protection for their pension benefits and do not benefit from a finding of partial termination. Their benefits, by virtue of vesting, are nonforfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non[ ]forfeitable." *Id.* We agreed with the notion voiced in *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989) and *Weil* that perhaps only non-vested participants ought to be counted, although neither court so held. Since we indicated that if we were writing on a blank slate we would have held differently, we now adopt the rule that only non-vested participants should be counted in determining whether partial termination of a pension plan has occurred.

Finally, the Plan asks us to reconsider our holding that multiple plan years can be aggregated in determining partial termination. *See Matz*, 227 F.3d at 976-77. We decline to do so. This aspect of our holding paid no deference to the IRS expressly because the IRS had not taken a position on the issue. *See Matz*, 227 F.3d at 977. Thus, since we analyzed

the issue without deference to the IRS, the Supreme Court's vacation and remand in light of *Mead* did not implicate this holding; therefore, it stands.

Thus, we hold that only non-vested participants should be counted in the partial termination analysis, and hereby REVERSE and REMAND this case to the district court for further proceedings consistent with this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING PETITION AND REMANDING CASE TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JUNE 25, 2001

SUPREME COURT OF THE UNITED STATES

No. 00-1279

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

petitioner,

v.

ROBERT J. MATZ

June 25, 2001

On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *United States v. Mead Corp.*, 533 U.S. __, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED SEPTEMBER 21, 2000

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1109

ROBERT J. MATZ, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 1095 — **Joan B. Gottschall**, *Judge.*

ARGUED MAY 17, 2000 — DECIDED SEPTEMBER 21, 2000

Before BAUER, COFFEY and KANNE, *Circuit Judges.*

BAUER, *Circuit Judge.* Robert J. Matz and other employees of Hamilton Investments, Inc. lost their jobs and the non-vested portions of their retirement benefit plan in 1994 when the company was sold. Matz filed suit on behalf

of himself and other terminated employees who were participants in the ERISA pension plan, claiming entitlement to the benefits as a result of a partial termination of the plan. To prove partial termination, he seeks to count both vested and non-vested participants and, because he believes that the partial termination was the result of a multi-year corporate reorganization, to aggregate terminations that occurred in multiple plan years. The District Court ruled that he could do both, and certified the issues to us for interlocutory appeal. We affirm.

I. BACKGROUND

In 1994, Household International, Inc. was the parent corporation of a varied group of companies. Its portfolio included mortgage companies, banking institutions, retail securities brokerages, insurance businesses and credit card companies. In August, 1994, Household began selling off some of its subsidiaries, beginning with Hamilton Investments, Inc., the company for which Robert Matz worked from March 28, 1989 until his termination on September 1, 1994.

Hamilton, through its parent corporation Household, provided a retirement benefit plan ("the Plan") to its employees. It was an employee benefit plan within the meaning of 29 U.S.C. § 1002(2)(A). The Plan allowed participants to make payroll contributions which were matched by contributions from Hamilton. Although the participant's contributions vested immediately, Hamilton's contributions were subject to deferred vesting. Section 14.1 of the Plan provided that a participant became vested in

Hamilton's contributions at a rate of 20% per year. Thus, a participant had to remain with Hamilton for five years before he became fully vested. If his service to the company ended before that time, he forfeited the non-vested portion of Hamilton's contribution.

When Matz's job ended he had a 60% vested benefit in his employer's matching contribution. He elected to take a distribution and was paid $27,914.10, which represented 100% of his contributions to the Plan and 60% of Hamilton's contributions. The remaining 40%, $7,289.92, was forfeited and used by Household to reduce its matching contributions.

Matz sues to recover his forfeited amount. If he can prove that there was a termination or partial termination of the Plan,[1] ERISA affords him relief. 26 U.S.C. § 411(d)(3) provides:

> A trust shall not constitute a qualified trust under § 401(a) unless the plan of which such trust is a part provides that —
>
> > A. Upon its termination or partial termination . . . the rights of all affected employees to benefits accrued to the date of such termination, partial termination or discontinuance, to the extent funded as of such date, or the amounts credited to the employee's accounts are nonforfeitable.

1. There is no dispute that the Plan continued after the sale of Hamilton. Thus, our inquiry focuses on the issue of partial termination.

ERISA does not, however, define what constitutes a partial termination. Treasury Regulation § 1.411(d)-2(b)(1) provides some guidance:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to **all the facts and circumstances** in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

(emphasis added).

Matz alleges that a partial termination of the Plan occurred beginning in August, 1994 (with the sale of Hamilton) and ending in May, 1996. During that period, Household discontinued or sold Household Mortgage Services, Inc., various branches of Household Bank, F.S.B., and Alexander Hamilton Life Insurance Company. Matz believes that this series of corporate transactions were part of a single reorganization plan and resulted in the Plan's partial termination. For that reason, he seeks to combine all of the terminations by Household in all of those years. He also seeks to count all fully vested employee terminations as well as non-vested employee terminations.

The Plan, by contrast, contends that a partial termination analysis should look at individual plan years, not aggregated

years. Furthermore, it argues that aggregation is inappropriate because there was no corporate reorganization that would justify such an approach. It also asks that only non-vested participants be counted. Finally, the Plan contends that any partial termination analysis must end on September 30, 1995, the date it issued a plan amendment vesting, fully and immediately, all participants.[2] Pointing to the language of 26 U.S.C. § 411(d)(3), the Plan states that participants who separated from service after September 30, 1995 cannot be "affected employees" because all Plan accounts became non-forfeitable at that time.

The parties briefed the issues to the District Court. The court, after careful analysis, ruled that both vested and non-vested participants could be counted to determine whether a partial termination occurred and that Matz could combine all terminations for 1994 through 1996. *Matz v. Household International Tax Reduction Investment Plan*, 1998 WL 851491 (N.D.Ill. 1998); *Matz v. Household International Tax Reduction Investment Plan*, 1999 WL 754659 (N.D.Ill. 1999). Upon the Plan's motion, the rulings were certified for interlocutory appeal. Now before us are the questions: (1) whether, for purposes of determining if the Plan was "partially terminated," the court's analysis should include fully-vested employees terminated after the 1995 Plan amendment; and (2) whether the plaintiff's partial termination analysis may include terminations that take place over multiple (here, three) plan years. We affirm the District Court.

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2. The amendment provides that "if a Participant's employment with [Household and its affiliates] is terminated for any reason on or after September 30, 1995 he shall be 100% vested in his account."

Appendix C

II. DISCUSSION

The question of whether a partial termination has occurred is a question of law subject to *de novo* review. *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988). Although many courts have addressed the issue of partial termination, few have addressed the questions of whether fully vested participants must be counted and whether the counting period is an individual plan year or the aggregation of multiple plan years. Indeed, they are issues of first impression to this court. We find that Matz has standing to raise these issues and address each one in turn.

A. Counting Of Vested And Non-Vested Participants

When interpreting congressional statutes, we look first at the plain language of the statute. *See Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). If the language is clear and unambiguous, we apply the statute so as to give effect to its plain meaning. *United States v. Hayward*, 6 F.3d 1241, 1245 (7th Cir. 1993). We cannot do that here because, although 26 U.S.C. § 411(d)(3) refers to a partial termination, it does not define it. Nor does it provide us with the framework for an analysis. Thus, we must search the legislative history for instruction.

The legislative history provides little more guidance than that found in the statute. The House and Senate Reports state only that "[e]xamples of a partial termination might include, under certain circumstances, a large reduction in the work force, or a sizable reduction in benefits under the plan."

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H.R.Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4731; S.Rep. No, 383, 93rd Cong. 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4935. Although this is somewhat more helpful, it still does not provide us with a clear standard by which to judge a particular case.

Our sister circuit struggled with the same dilemma before inviting an *amicus* brief from the IRS. *See Weil v. Retirement Plan Administrative Committee*, 933 F.2d 106, 109-10 (2nd Cir. 1991) ("*Weil III*"). The *Weil III* decision, finding that vested and non-vested participants must be counted when determining whether a partial termination occurred, was the culmination of several decisions by the District Court and the Second Circuit. Initially, the District Court ruled that a partial termination had not occurred. *Weil*, 577 F.Supp. 781 (S.D.N.Y. 1984). The Second Circuit reversed. *Weil*, 750 F.2d 10 (2d Cir. 1984) ("*Weil I*"). On remand, the District Court, counting both vested and nonvested participants, found that a partial termination had occurred. *Weil*, 1988 WL 64862 (S.D.N.Y. 1988). The Second Circuit reversed again, holding that only non-vested participants should be considered. *Weil*, 913 F.2d 1045, 1050-51 (2nd Cir. 1990) ("*Weil II*").

On rehearing, the *Weil III* court had the benefit of the IRS' position of the issue. Giving "great weight" and deference to the IRS' view that both vested and non-vested participants should be counted, the Second Circuit vacated, in part, its ruling in *Weil II* and held that both classes of participants were to be considered in a partial termination analysis. *Weil*, 933 F.2d at 110. In so doing, the court found that the IRS' interpretation was reasonable and judicial deference was required as the IRS was the agency responsible for administering the partial termination statute. *Id.*

Appendix C

"Courts have generally held that termination of a number of employees does not constitute a 'partial termination' unless there is a significant reduction in plan participants." *Matz*, 1998 WL 851491, *2. To determine whether there is a significant reduction in plan participants, courts apply a "significant percentage" test. *Kreis v. Charles O. Townley, M.D. & Associates*, 833 F.2d 74, 79 (6th Cir. 1987). Partial termination is measured by using the ratio of terminated plan participants over total plan participants.

Matz urges us to include all terminated participants (vested and non-vested) in the numerator, while the Plan asks us to consider only the non-vested participants in the top of the equation. Both claim that their method best furthers the purposes of the statute. Once again, however, both the statute and its legislative history are silent as to the purpose of the partial termination statute. Courts, though, have generally understood the statute's purposes to be: (1) to protect employees' legitimate expectation of pension benefits; and (2) to prevent employers from abusing pension plans to reap tax benefits. *Weil*, 933 F.2d at 106, 107; *Halliburton v. Commissioner of Internal Revenue*, 83 T.C. 154, 161 (1984).

The Plan argues that the counting of vested participants would further neither of these purposes. It states "[t]he partial termination remedy is aimed at protecting employees from a forfeiture of unvested benefits, and preventing employers from receiving sizable, tax-free reversions of surplus plan assets." From a policy standpoint, the Plan makes a logical argument. Vested participants do not need further protection for their pension benefits and do not benefit from a finding

of partial termination. Their benefits, by virtue of vesting, are nonforfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non-forfeitable. We agree with the Plan's arguments. And, as the District Court stated, "if [we] were writing on a blank slate, [we] would be inclined to consider only non-vested employees" in deciding whether a partial termination had occurred. However, we are not writing on a clean slate.

We are not alone in our view or our holding. The District Court for the Eastern District of Louisiana ruled that both vested and non-vested terminees must be considered, "[e]ven though the issue of partial termination affects only non-vested participants." *Morales v. Pan American Life Insurance Company*, 718 F.Supp. 1297, 1302 (E.D. La. 1989). Although the District Court's decision was appealed, the Fifth Circuit did not decide the issue, holding instead that plaintiff Morales, a vested employee, did not have standing to raise the issue on behalf of the non-vested employees. *Morales v. Pan American Life Insurance Company*, 914 F.2d 83, 86 (5th Cir. 1990).

In a thorough and thoughtful opinion, the District Court for the Southern District of Texas also agreed that neither policy was furthered by the counting of vested participants. But, it ruled that only non-vested terminees would be counted. *In re Gulf Pension Litigation*, 764 F.Supp. 1149, 1165 (S.D.Tex. 1991). Realizing that approach would skew the percentage calculation and cause it to be artificially low (thereby increasing the chances of finding that there had not been a significant reduction in plan participants) the court excluded vested participants from both halves of the ratio.

Id. at n.10. Having calculated in this manner, the court found a partial termination of the plan. On appeal, the Fifth Circuit did not consider whether a partial termination occurred and affirmed on other grounds. *Borst v. Chevron Corporation*, 36 F.3d 1308, 1314, n.11 (5th Cir. 1994) ("Because we do not consider whether or not a partial vertical (or horizontal) termination occurred, the district court's ruling on this issue is not conclusive between the parties.").

Purely from a policy standpoint, we believe that the method adopted in *Gulf Pension Litigation* best furthers the purposes of the partial termination statute. However, we are constrained in our analysis of the statute and must decide only whether the IRS' construction is reasonable. *See Weil*, 933 F.2d at 107-08. We conclude that it is. Neither the statute, its legislative history nor the Treasury Regulation mentioned above differentiate between vested and non-vested participants. Indeed, the Treasury Regulation says that a partial termination may occur when "a group of employees," previously covered by the plan, are excluded from the plan by reason of a severance from employment.

A finding of reasonableness is also supported by the fact that the exclusion of vested participants from the ratio calculation gives an inaccurate assessment of whether there has been a significant reduction in plan participation, the benchmark against which partial termination is measured. For the calculation to be accurate, the circumstances as a whole must be considered. This, we think, buttresses a finding that vested participants must be included.

"To uphold [the agency's interpretation] we need not find that [its] construction is the only reasonable one, or even

that it is the result we would have reached had the question arisen in the first instance in judicial proceedings . . . We need only conclude that it is a reasonable interpretation of the relevant provisions." *Weil III*, 933 F.2d at 107-08 (internal quotation marks and citations omitted.). For the above reasons, we find that there is a factual basis for finding that the IRS' interpretation of the statute is reasonable. That is the only question on which we must rule. The order of the District Court, finding that both vested and non-vested terminees must be considered in its partial termination analysis, is affirmed.[3]

B. Aggregation Of Multiple Plan Years

We next turn to the question of whether terminations occurring in multiple plan years can be combined in determining partial termination. Initially, we note that this issue has been addressed by only two other courts (excluding the District Court below) and both have found that it is permissible to aggregate terminations for multiple years. *Weil*, 750 F.2d at 13, n.2; *Gulf Pension Litigation*, 764 F.Supp. at 1167-68.[4] We add our voice to theirs.

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3. We make a special point of noting, for the sake of clarity, that employees who were vested in 1995 by virtue of the Plan amendment are to be counted. The fact that they vested because of the Plan amendment and not because of years of service is of no consequence.

4. In *dicta*, the United States Tax court stated "we do not agree that we should limit ourselves to considering the events of only one plan year in resolving the partial termination issue, as events bearing on such issue may extend over more than one year." *Halliburton*, 100 T.C. at 246.

Appendix C

Matz argues that it is proper to combine all participant terminations in 1994, 1995 and 1996 because Household engaged in a corporate reorganization during that time.[5] The Plan counters by arguing that because this a tax event, the relevant period should be one year, as are tax years. It also argues that "[a]ll of the published Revenue Rulings dealing with the issue of partial terminations" examined only terminations occurring within a single plan year. We note, however, that in all of the decisions cited by the Plan, the event that affected the plan participants occurred within one year. Thus, those cases are inapposite and unpersuasive in our analysis.

Neither the statute nor its legislative history specify whether aggregation is permissible. The IRS has taken no position on the issue and because of that we receive no guidance from it. The only instruction we have comes from Treasury Regulation §1.411(d)-2(b)(1), which provides that we must consider "all of the facts and circumstances in a particular case." No framework is provided beyond that.

We hold that because there is nothing in the language of the rule itself that requires a significant corporate event to occur within a plan year, Matz can combine terminations from 1994, 1995 and 1996, provided that he show that the corporate events of those years were related. We believe this view reflects the realities of the modern corporate world. Mergers and corporate reorganizations have grown into large and complex events, *see e.g.*, *In re Gulf Pension Litigation*,

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5. The issue of whether the defendant's events of 1994, 1995 and 1996 were a corporate re-organization or a corporate event is not before this court and we do not decide that issue.

764 F.Supp. 1149, and often cannot be completed in one year. Furthermore, to establish a rigid rule that only terminations in individual plan years can be counted allows an unscrupulous employer to terminate some participants in December of one year and January of the next year, thereby eviscerating both the purpose of protecting employee benefits and the purpose of prohibiting employers from reaping unfair tax benefits. We are convinced that the requirement that the multiple year terminations be proven related prevents a plaintiff from gaining undue advantage too.

III. CONCLUSION

For the foregoing reasons, the orders of the District Court, holding that both vested and nonvested participants both be counted and that multiple plan years may be aggregated, in considering whether the Plan was partially terminated, are affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED NOVEMBER 30, 1998

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 1095

Judge Joan B. Gottschall

ROBERT J. MATZ, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff Robert J. Matz is seeking to bring a class action against the Household International Tax Reduction Investment Plan ("the Plan") under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* He alleges that he is entitled to accelerated vesting of his pension benefits because his firing by Hamilton Investments, Inc. ("Hamilton"), a wholly owned subsidiary of Household International, Inc. ("Household"), was part of

a corporate reorganization that constituted a "partial termination" under the Plan and 26 U.S.C. §411(d)(3). Matz purports to bring this action on behalf of a class consisting of other employees of Household and its subsidiaries who were also denied vesting under the alleged partial termination. The parties agreed to brief preliminary issues before addressing class certification. Currently before the court is the Plan's motion requesting that this court find that (1) employees who were terminated after September 1995, when the Plan was revised to give full vesting to terminated employees, shall not be considered for the purposes of determining if a partial termination occurred and (2) such employees may not be part of the class. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

Matz was employed by Hamilton from March 28, 1989 through September 1, 1994. As an employee of Hamilton, Matz participated in the Plan. The Plan is an employee benefit plan within the meaning of section 3(2)(A) of ERISA, 29 U.S.C. §1002(2)(A). Matz elected to make payroll contributions to the Plan. His contributions were matched by contributions from Hamilton.

The Plan contained a deferred vesting schedule for Hamilton's matching contributions. Section 14.1 of the Plan provides that a participant becomes vested at a rate of 20% per year, thus requiring five years of service for the participant to be 100% vested. However, Section 19.2 of the Plan provides that "in the case of the termination of the Plan by Household International, Inc. . . . or a partial termination of

the Plan with respect to a group of participants, the account balance of each affected participant shall become 100% vested." Presumably, the Plan contains this language in order to comply with 26 U.S.C. §411(d)(3), which requires an employee benefit plan to vest fully the benefits of participants when a plan is terminated or when there is a partial termination of the plan.

On September 1, 1994, when Matz was terminated, he had a 60% vested benefit in the employer's matching contributions to the Plan. After his termination from Hamilton, Matz received a distribution of his entire vested benefits in the amount of $27,914.10. This distribution was equal to 100% of the account balance attributable to Matz' own contributions to the Plan and 60% of the account balance attributable to the matching contributions from Hamilton. The remaining 40%, $7,289.92, was forfeited and was used by Household to reduce its matching contributions.

In September 1995, Household amended the Plan to eliminate the deferred vesting schedule and vest fully all participants. In particular, the Plan was amended to provide that "if a Participant's employment with [Household and its affiliates] is terminated for any reason on or after September 30, 1995 he shall be 100% vested in his account."

In this action Matz alleges that a partial termination of the Plan occurred between August 1994 and May 1996 and that he and other class members are thus entitled to 100% vesting in their account balances. Matz claims that he and other class members were terminated as part of Household's reorganization plan. Matz contends that during the course of

an approximately two and one-half year period, Household divested itself of certain non-core subsidiary businesses, such as mortgage, thrift banking, retail securities brokerage and insurance businesses. The Plan denies that a partial termination occurred and argues that the various business transactions between August 1994 and May 1996 were isolated transactions and not part of a reorganization plan.[1]

Courts have generally held that termination of a number of employees does not constitute a "partial termination" unless there is a significant reduction in plan participants. In determining whether there is a significant reduction in plan participants, courts often have applied a "significant percentage" test. *See Kreis v. Charles O. Townley, M.D. & Assoc.*, 833 F.2d 74, 79 (6th Cir. 1987). For the significant percentage test, courts look to see if a significant percentage of plan participants have been terminated.

In actions such as this one, calculating the percentage reduction is not straightforward because the parties often disagree on how to measure the number of plan participants

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1. The question of whether or not there was a reorganization plan is important because it may affect the determination whether a "partial termination" has occurred. As described *infra*, to establish a partial termination, Matz needs to prove that a significant percentage of plan participants were terminated. If, instead of relying only on the terminations resulting from the sale of Hamilton, Matz can aggregate the terminations from all transactions during the purported reorganization, it is more likely Matz will be able to show that a significant percentage of plan participants were affected and that a partial termination occurred. However, the question whether the various transactions may be aggregated for the purpose of determining if a partial termination occurred is not currently before the court.

terminated.[2] Here, Matz argues that both vested and non-vested plan participants who were terminated should be counted in determining if there was a significant reduction in plan participation. The Plan disagrees. In particular, in the present motion, the Plan argues that employees who were terminated after September 30, 1995 should not be counted for the purpose of determining if a partial termination occurred. As noted above, an amendment to the Plan granted full vesting to employees who were terminated after September 30, 1995.

This motion raises only the narrow issue of whether employees terminated after September 30, 1995 may be counted for the purposes of the partial termination analysis and whether they may be members of the class represented by Matz. The parties are not at this time seeking a determination whether a partial termination occurred or whether the various transactions between August 1994 and May 1996 may be aggregated for deciding if a partial termination has occurred.

DISCUSSION

The relevant statute and regulation do not provide any guidance on whether fully vested employees who are terminated should be counted in determining if a partial termination has occurred. Indeed, the statute and regulation

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2. For example, here, the parties dispute whether Matz can aggregate terminations over the course of approximately two and one-half years to come up with a greater percentage reduction or whether it is appropriate to consider only those employees who were terminated along with Matz when Hamilton was sold.

offer little assistance for analyzing whether a partial termination has occurred. Although 26 U.S.C. § 411(d)(3) refers to "partial termination," it does not define the term:

> a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that —
>
> (A) upon its termination or partial termination,
>
> * * *
>
> the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

26 U.S.C. §411(d)(3).

The relevant Treasury Regulation is not significantly more helpful:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely

> affect the rights of employees to vest in benefits under the plan.

Treas. Reg. §1.411(d)-2(b)(1).

The legislative history of §411(d)(3) likewise provides little insight into what constitutes a partial termination. The House and Senate Reports state that "[e]xamples of a partial termination might include, under certain circumstances, a large reduction in the work force, or a sizable reduction in benefits under the plan." H.R.Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4731; S. Rep. No. 383, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4935.

Few courts have addressed whether fully vested employees who are terminated should be counted in a partial termination analysis.[3] In *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106, 109 (2d Cir. 1991) ("*Weil III*"), the Second Circuit, on rehearing, held that vested as well as non-vested plan participants must be counted when determining if a partial termination occurred. 933 F.2d at 109-10. *Weil III* was the culmination of several decisions by the district court and the Second Circuit. Initially, the district court ruled that a partial termination had not occurred. *Weil*, 577 F. Supp. 781 (S.D.N.Y. 1984). The Second Circuit reversed. 750 F.2d 10 (2d Cir. 1984) ("*Weil I*"). On remand, the district court found that a partial termination had occurred. In determining that a partial termination occurred, the district court included

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3. The parties have not cited to and the court has not found any partial termination cases in which a portion of the plan participants terminated were granted full vesting by an amendment to the plan.

both vested and non-vested participants in its calculation of the percentage of participants affected by the corporate reorganization. *Weil*, 82 Civ. 8468, 1988 WL 64862 (S.D.N.Y. Jun. 15, 1988). The Second Circuit reversed, finding that no partial termination had occurred. *Weil*, 913 F.2d 1045 (2d Cir. 1990) ("*Weil II*"). The court of appeals held that the district court should have considered only non-vested participants in determining if a significant reduction in plan participation had occurred. In reaching this conclusion, the court stated

> As the district court herein recognized, it "seems logical" to consider only non-vested participants in determining whether a partial termination has occurred, since these are the employees whose pension benefits are most affected by a termination. Vested participants who are discharged also are affected in that they are not eligible for future employer contributions. Nonetheless, the legislative history of the partial termination provisions suggest that one of Congress's concerns was to prevent the forfeiture of unvested pension benefits, and we do not believe that Congress also intended to insure future plan participation for those whose benefits already had fully vested. Moreover, to the extent that the partial termination rules are designed to prevent employers from creating pension plans for the purpose of evading tax liability, this interest would not seem to be implicated with respect to participants whose benefits have completely vested.

Weil II, 913 F.2d at 1050-51 (citations omitted).

Appendix D

On rehearing, the Second Circuit vacated in part its decision in *Weil II* and found that a partial termination had occurred. The court reviewed the language of the statute, the Treasury Regulation, and the legislative history concerning partial termination and concluded that the legislative intent behind §411(d)(3) is ambiguous. *Weil III*, 933 F.2d at 109. The court then examined the construction of §411(d)(3) by the Internal Revenue Service (IRS), which is the agency responsible for administering the partial termination statute.[4] The court noted that when Congress' intent for a statutory provision is ambiguous, a court should defer to the construction by the administering agency if it is a "permissible construction of the statute." *Weill III*, 933 F.2d at 107-08 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The IRS stated that its long-standing position is that all terminated participants, both vested and non-vested, should be counted in determining if a partial termination has occurred. The court found that the IRS' construction was reasonable in light of the statute's silence and the examples provided in the House and Senate Reports ("a large reduction in the work force, or a sizable reduction in benefits under the plan"). 933 F.2d at 110. The court noted that these reports suggest that "Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole." *Id.* The court also noted that neither the statute, the Treasury Regulation, nor the House and Senate Reports distinguished between vested and non-vested participants.

Like the court in *Weill III*, this court finds that the purpose behind the partial termination statute is ambiguous. Courts

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4. The IRS provided its interpretation of the statute in an amicus brief, which was submitted after the decision in *Weil II*.

have identified two possible purposes for the partial termination statute: (1) protecting the pension benefits of non-vested participants; and (2) preventing employers from abusing pension plans to reap tax benefits. *See Weil III*, 933 F.2d at 109. From a policy standpoint, it is unclear why courts should consider vested plan participants who are terminated in analyzing if a partial termination has occurred. Vested participants do not need further protection for their pension benefits (and of course do not "benefit" from a finding that a partial termination occurred), and an employer cannot reap tax benefits from terminating vested participants because vested participants do not forfeit any pension benefits to the employer. *See In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1165 (S.D. Tex. 1991) (noting that neither policy furthered by counting vested terminees in analyzing if partial termination occurred), *aff'd, Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994). If this court were writing on a blank slate, it would be inclined to consider only non-vested employees who were terminated in considering if a partial termination had occurred.

However, this court is not free to impose its own construction on the statute. Instead, this court must determine only whether the IRS' construction is reasonable. As was made clear in *Weil III*, the IRS has interpreted the partial termination statute as requiring that "all terminated participants, both vested and non-vested, should be counted in determining whether a partial termination has occurred. The IRS thus measures partial terminations using the ratio of terminated plan participants (vested and non-vested) over total plan participants." *Weil III*, 933 F.2d at 106 (quotation omitted). Like the court in *Weil*, this court finds that the

interpretation by the IRS is reasonable. The examples of partial terminations given in the House and Senate Reports (such as "a large reduction in the work force") "suggest that Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole." *Weil III*, 933 F.2d at 110. The reports do not distinguish between vested and non-vested participants, i.e., the example does not refer to a large reduction in non-vested employees.

The Plan argues that the situation here is different from *Weil*. The Plan argues that, in contrast to *Weil*, where there was a mix of vested and non-vested participants who were terminated, here, after September 30, 1995, there were no longer any non-vested participants. Consequently, for employees terminated after September 30, 1995, there is no need for a partial termination remedy. However, this argument confuses the consequences of a partial termination — full vesting — with the standards for determining if a partial termination has occurred. The IRS has construed the partial termination statute so that the trigger for a partial termination is a significant reduction in plan participation, without regard to whether the terminated participants are vested or non-vested. If Matz' view of the case is correct — that the various corporate transactions between August 1994 and May 1996 were part of a larger corporate reorganization plan — then the effect of the September 1995 amendment in the plan was merely to increase the proportion of vested to unvested participants who were affected by the reorganization plan. Of course, the Plan may show that the various transactions were not part of a larger plan; that issue is not yet before the

court.[5] Nevertheless, assuming for the purposes of this motion that there was a reorganization plan, the situation here is not significantly different from that in *Weil*. As in *Weil*, there were vested and non-vested participants affected by the corporate actions.

Therefore, the Plan's motion is denied to the extent that it seeks to exclude plan participants who were terminated after September 1995 from the analysis whether a partial termination has occurred. However, the Plan's motion is granted to the extent that it seeks to exclude from the purported class participants who were terminated after September 1995. Matz failed to respond to this part of the motion, perhaps due to a belief that it was not properly raised. This court concludes that the matter was properly raised and that there is no basis for including such participants in the class. Due to the September 1995 amendment, these employees were fully vested and thus these employees have suffered no injury that can be redressed by this action.

ENTER:

s/ Joan B. Gottschall
JOAN B. GOTTSCHALL
United States District Judge

DATED: November 30, 1998

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5. If the Plan establishes that the various transactions and resulting terminations were not part of a larger plan, then only those participants terminated from Hamilton with Matz will be counted for the partial termination analysis.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 16, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 00-1109

ROBERT J. MATZ,

Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 96 C 1095

Joan B. Gottschall, *Judge.*

Appendix E

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-referenced case by plaintiff-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing is hereby DENIED.

APPENDIX F — BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN *WEIL, et al. v. RETIREMENT PLAN ADMINISTRATIVE COMMITTEE OF THE TERSON, CO., INC., et al.* DATED NOVEMBER 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WARREN WEIL and MARIA GALUPPO,

Plaintiffs-Appellees-Cross-Appellants

v.

RETIREMENT PLAN ADMINISTRATIVE COMMITTEE OF THE TERSON CO., INC., THE TERSON CO., INC., THE NORTHERN TRUST CO., as Trustees of the Terson Co., Inc. Salaried Retirement Plan,

Defendants-Appellants-Cross-Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

Appendix F

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Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 89-9223, 89-9255

WARREN WEIL and MARIA GALUPPO,

Plaintiffs-Appellees-Cross-Appellants

v.

RETIREMENT PLAN ADMINISTRATIVE COMMITTEE OF THE TERSON CO., INC., THE TERSON CO., INC., THE NORTHERN TRUST CO., as Trustees of the Terson Co., Inc. Salaried Retirement Plan,

Defendants-Appellants-Cross-Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

On September 13, 1990, this Court issued an opinion reversing the judgment of the District court in this case. The plaintiffs have filed a petition for rehearing. This brief is submitted pursuant to the Court's order of November 2, 1990, inviting the Government to submit a brief as *amicus curiae*.

STATEMENT

Warren Weil and Maria Galuppo (plaintiffs) were employed by Ward Foods, Inc., from 1973 until 1981.

Appendix F

Plaintiffs were participants in Ward's retirement plan (the Plan). In 1980, The Terson Company, Inc., acquired Ward. Terson's subsequent reorganization of Ward's operations resulted in the termination of the employment of more than 100 of the Ward employees who had been participants in the Plan, including the plaintiffs. As required by Section 411(d)(3) of the Internal Revenue Code, the Plan provided that in the event of its "partial termination," the terminated employees who were not yet vested in the Plan would be entitled to nonforfeitable benefits. Plaintiffs brought this action asserting that a "partial termination" of the Plan had occurred, and seeking a declaration that they were entitled to nonforfeitable benefits.

The District Court granted defendants' motion for summary judgment. *Weil* v. *Retirement Plan Admin. Committee*, 577 F. Supp. 781 (S.D.N.Y. 1984). Plaintiffs appealed and this Court reversed and remanded. *Weil* v. *Retirement Plan Admin. Committee*, 750 F. 2d 10 (2d Cir. 1984) ("*Weil I*"). The Court held that the "dismissal of a 'significant number of employees' in connection with a major corporate event constitutes a partial termination." *Id.* at 12 (emphasis omitted). Since the summary judgment record was inadequate to determine whether the Plan was partially terminated, the case was remanded for further proceedings. *Id.* at 13.[1] On remand, the District Court concluded that a partial termination had occurred. (A. 1437-1445.)[2] The court found that of the 386 employees participating in the Plan in

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1. At the Court's request, the Government filed an *amicus curiae* brief in *Weil I.*

2. "A." references are to the joint appendix.

1981, 132, or 33.4%, were terminated. Only 65 participants, or 16.4% of all employees participating in the Plan in 1981, were terminated without vested benefits. (A. 1441.) The court concluded that "a partial termination of the plan took place in 1981 when 33.4% of the plan participants were terminated in connection with Terson's acquisition and reorganization of Ward Foods." (A. 1445.)

Defendants appealed and this Court reversed. The Court held that in determining whether a significant number of employees were terminated only terminated participants whose pension benefits had not yet vested should be considered. Slip op. 6427-6430. The Court reasoned in this regard that, since terminated participants whose benefits had vested were fully protected regardless of whether the reduction in participants was deemed a partial termination, such vested former participants should be ignored in computing the percentage reduction in the number of participants. *Id.* at 6428-6429. In reaching this conclusion, the Court relied in part (*id.* at 6429) on a determination letter issued by the Internal Revenue Service (IRS) to the Ward retirement plan for earlier years (A. 905-906) wherein the IRS considered only non-vested participants in concluding that a 15% reduction in participation did not result in a partial termination. Focusing only on the 65 terminated non-vested participants, the Court concluded that, since only a 16.4% reduction in the number of employees participating in the plan had resulted from the reorganization of Ward Foods, there had not been a dismissal of a significant number of employees and, hence, a partial termination had not occurred. Slip op. 6430-6432.

Appendix F

DISCUSSION

1. The Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, Section 1012(a), added Section 411 to the Internal Revenue Code, setting minimum vesting standards for qualified pension plans. Among the conditions that a plan must meet in order to obtain the tax benefits accorded to qualified plans is the requirement, imposed by Section 411(d)(3), that the plan must provide that in the event of a "termination or partial termination" of the plan, "the rights of all affected employees to benefits accrued to the date of such termination, [or] partial termination * * *, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable." The statute does not define the term "partial termination." The Committee Reports on ERISA state that "a partial termination might include, under certain circumstances, a large reduction in the work force, or a sizable reduction in benefits under the plan." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 65 (1974-3 Cum. Bull. Supp. 236, 300); S. Rep. No. 93-383, 93d Cong., 2d Sess. 50 (1974-3 Cum. Bull. Supp. 80, 129).[3]

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3. Employees whose benefits are vested as of the time of the termination of their employment are entitled to nonforfeitable benefits regardless of whether their termination constituted a partial termination of the plan. See Code Sec. 411(a)(2)(A) and (B). Thus, the effect of the partial termination provision is that the accrued benefits of employees who are not yet vested become nonforfeitable, to the extent that those benefits have been funded. In the absence of a partial termination, terminated non-vested employees would forfeit all pension benefits.

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The Treasury Regulations under Section 411(d) provide that the Commissioner shall determine whether a partial termination has occurred based on "all the facts and circumstances in a particular case." Treas. Reg. § 1.411(d)-2(b)(1) (26 C.F.R.). One of the relevant circumstances described by the regulation is "the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan." Several Revenue Rulings indicate that a partial termination occurs where a significant percentage or number of plan participants are dismissed as a result of a significant change in the employer's business operations. Rev. Rul. 81-27, 1981-1 Cum. Bull. 228; Rev. Rul. 73-284, 1973-2 Cum. Bull. 139; see also Rev. Rul. 72-439, 1972-2 Cum. Bull. 223.

Relying on the above-cited legislative history, regulation, and rulings, this Court held in *Weil I* that the "dismissal of a 'significant number of employees' in connection with a major corporate event constitutes a partial termination." 750 F. 2d at 12 (emphasis omitted). Accordingly, in the instant appeal, the Court inquired into whether a significant percentage of employees covered by the Plan had been dismissed. The question presented in plaintiffs' petition for rehearing is whether only terminated non-vested employees should be taken into account in determining whether a significant percentage of employees were dismissed, as the Court held (slip op. 6427-6430), or whether all terminated employees, both vested and non-vested, should be taken into account. We submit that the Court's holding in this appeal reflects an incorrect interpretation of Section 411(d)(3) and the regulations thereunder. It appears that the Court's holding was based in substantial part on its view that the IRS

considers only terminated non-vested participants in determining whether a reduction in the number of plan participants is of sufficient magnitude to constitute a partial termination (slip op. 6429-6430). As we shall show, however, the IRS's position is that all terminated participants, both vested and non-vested, should be counted in determining whether a partial termination has occurred.

2. As noted above, the Committee Reports on ERISA state that "a partial termination might include, under certain circumstances, a large reduction in the work force." H.R. Rep. No. 93-807 at 65; S. Rep. No. 93-383 at 50. Similarly, the regulations state that "the exclusion, by reason of . . . severance by the employer, of a group of employees who have previously been covered by the plan" can be a partial termination. Congress contemplated that the term "partial termination" would encompass an event resulting in a significant contraction of a plan, such as a significant reduction in the number of plan participants. In measuring whether there has been such a significant reduction, logic alone would dictate that all terminated participants, vested as well as non-vested, should be taken into account. In referring to "a large reduction in the work force" and the severance of "a group of employees who have previously been covered by the plan," the Committee Reports and the regulation certainly draw no distinction between vested and non-vested employees.

The Court here compared the number of terminated non-vested participants with the total number of participants in computing the percentage used to determine whether there was a significant reduction in plan participation. The resulting

percentage measures neither the reduction in plan coverage as a whole nor the reduction in non-vested participants, and accordingly provides no accurate measure of whether there has been a "large reduction in the work force" or other significant contraction in the plan.[4] In the instant case, more than one-third of the Plan's participants were discharged as a result of the Terson takeover. This plainly was a "large reduction in the work force." Nevertheless, under this Court's methodology, the reduction in the plan's participants is too insignificant to be deemed a partial termination. This is telling evidence that the Court's methodology for determining whether a partial termination occurred is at odds with the legislative intent behind the partial termination provision of Section 411(d)(3).

3. Contrary to the Court's conclusion in its opinion (slip op. 6429-6430), the position of the IRS is that all plan participants, whether or not fully vested, are to be considered in determining whether there has been a partial termination. In the Revenue Rulings cited at p. 5, *supra*, the IRS compared

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4. To be sure, the *consequences* of a partial termination are different for vested and non-vested terminated participants. But the question whether there is a significant contraction of the plan, and hence a partial termination, is distinct from the question of the consequences of a partial termination. Moreover, even if the Court were correct in its view that the focus should be on non-vested terminated employees exclusively in determining whether a partial termination has occurred, the Court should have compared the number of terminated *non-vested* participants to the total number of *non-vested* participants prior to the Terson takeover, rather than comparing the number of terminated non-vested participants to the total number of employees, vested and non-vested, who were participants prior to the Terson reorganization.

the total number of plan participants and the total number of terminated participants in concluding that a significant number of participants were terminated. The Court stated that "these rulings do not indicate whether the distinction between vested and non-vested participants was at issue in those rulings." Slip op. 6427-6428. The distinction was not at issue because the IRS's position is that the distinction is not pertinent in determining whether a partial termination has occurred.

The Court referred in its opinion (slip op. 6431-6432) to the IRS's Plan Termination Standards, Document 6678 (4-81). (A. 159-163.) The Standards note that in Rev. Rul. 81-27 and Rev. Rul. 73-284, "a significant percentage of employees, in each case over 50%, were effectively excluded from participating in the plan." (A. 160.) They further state that "[t]here is no fixed percentage of employees, nor any fixed number of employees, that we may set as guidelines. The facts and circumstances must be considered for each case." (*Ibid.*) The Standards state that a "reduction in the number of employees covered by the plan" should be considered as a factor in the partial termination inquiry, and suggest, as an example, that "a reduction of 20% of the number of employees covered" might result in a partial termination "where the 20% represented the elimination of a division, a plant closing, the discontinuance of a particular product, etc." (*Ibid.*) Thus, the Plan Termination Standards look at a "reduction in the number of employees covered by the plan" but draw no distinction between vested and non-vested employees. The District Court correctly observed that "the language in the Standards suggests that the total number of covered employees terminated, regardless of their

vesting status, should be considered in figuring the percentage." (A. 1444.)

The Plan Termination Handbook contained in the Internal Revenue Manual expressly sets forth this long-standing IRS position. The Handbook states: "The Service takes the position that, in general, fully vested terminatees are included in determining whether there has been a partial termination. This position was upheld in *Weil* v. *Terson Co. Retirement Plan Committee*, 82 Civ. 8468 (S.D.N.Y. June 15, 1988)." IRM 7753, Chapter 252(7) (April 20, 1990), reprinted in 4 Administration, CCH Internal Revenue Manual at 21,151. This statement in the Plan Termination Handbook apparently was not brought to this Court's attention by the parties. The Court's mistaken view that the IRS considers only terminated non-vested participants in determining whether a partial termination has occurred (slip op. 6429-6430) was based primarily on a determination letter issued to Ward by a local IRS district office in 1981 that concluded that no partial termination of the Plan had occurred during the years 1975-1980 (A. 905-906). As the Court observed (slip op. 6429), the letter compared the number of terminated non-vested employees to the total number of plan participants in determining that there was not a significant percentage of terminated participants. That determination letter, however, insofar as it indicated that only non-vested participants are taken into account, did not represent the IRS's position then and hence was issued erroneously.[5]

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5. The Director of the Employee Plans Technical and Actuarial Division of the Internal Revenue Service has advised us that the position of the IRS is, and has been, that all terminated participants

(Cont'd)

Appendix F

The Court also relied on (slip op. 6429 n. 2) IRS Form 5310 (A. 680-684), which an employer must submit to the IRS to request a determination as to whether a plan has partially terminated. The Court noted that the form asks an employer to provide, in addition to the total number of terminated participants, the number of participants terminated without full vesting. (A. 682.) The Court stated that "the information requested by form 5310 provides further evidence that the IRS focuses on the number of non-vested participants when determining whether a partial termination has occurred." Slip op. 6429 n.2. The Court drew the wrong conclusion. The number, if any, of terminated non-vested participants is relevant because if all of the terminated participants are vested, the question whether there has been a partial termination would be a moot point, since the benefits of terminated vested participants are nonforfeitable regardless of whether there has been a partial termination. Moreover, although the number of terminated non-vested employees alone is not the appropriate means for measuring the magnitude of the reduction of plan participants, that number is relevant to one of the other factors examined in determining whether a partial termination has occurred, *viz.*, the possibility that forfeited pension benefits will revert to the

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(Cont'd)
are taken into account in determining whether a partial termination has occurred, and that, to the extent the determination letter issued to the Ward plan for earlier years indicated otherwise, the letter was and is contrary to the IRS's position. Although the defendants may be entitled to rely on the determination letter with respect to the years 1975-1980, they certainly cannot rely on that letter as setting forth the position of the IRS as to whether a partial termination occurred in 1981, the year in issue here.

employer. Both the Plan Termination Standards (A. 159, 160) and the Plan Termination Handbook (IRM 7753, Chapter 252(4) and (8)) state that the "potential for reversion" is a factor in the partial termination inquiry. Since the information required by Form 5310 is relevant for other purposes, that form provides no support for the Court's conclusion that the IRS focuses only on non-vested participants in determining whether a significant percentage of participants have been terminated.[6]

Finally, we note that the Court's opinion is somewhat unclear as to what numbers should be compared in determining whether there has been a significant reduction in plan participation. The opinion states that 16.4% of the plan's participants were terminated non-vested participants. Slip op. 6422; see A. 1441. But in its "significant percentage" inquiry, the Court stated that "only 16.4% of the non-vested participants were terminated." Slip op. at 6432; see also *id.* at 6430 (referring to "the discharge of 16.4% of the non-vested participants"). If the Court meant to compare the number of terminated non-vested participants with the total number of non-vested participants prior to the Terson

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6. The Court also stated that the deposition testimony of IRS Agent Chester Lamar confirmed that the IRS focuses on the percentage of non-vested terminatees. Slip op. 6429. Lamar's testimony is confusing at best; at some points in his deposition he seems to indicate that all terminated participants are taken into account in determining whether a significant percentage of participants were terminated. (A. 82-83, 120.) To the extent that his testimony in other places indicates to the contrary, he was misinformed as to the IRS's actual position.

takeover, then the 16.4% figure is erroneous.[7] If the Court meant to compare the number of terminated non-vested participants with the total number of participants, the 16.4% figure is accurate. In determining whether that percentage was "significant, the Court contrasted it to the 20% figure set forth in the IRS Plan Termination Standards, and to percentage reductions deemed insignificant in other cases. Slip op. 6431-6432 (citing *Kreis* v. *Charles O. Townley, M.D. & Assoc.*, 833 F. 2d 74 (6th Cir. 1987); *Morales* v. *Pan American Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989)). The Court, however, was comparing apples and oranges, because the percentage reductions in the Standards and those cases were based on a comparison of the total number of terminated participants (both vested and non-vested) with the total number of participants. The Court here compared the total number of terminated non-vested employees to the total number of participants.

The District Court concluded that "a partial termination of the plan took place in 1981 when 33.4% of the plan participants were terminated in connection with Terson's acquisition and reorganization of Ward Foods." (A. 1445.) Since the District Court applied the correct methodology in measuring the magnitude of the reduction in the number of

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7. The record does not appear to indicate the total number of participants who were non-vested at the time of the Terson takeover. Thus, the exact percentage reduction in the number of non-vested participants resulting from the Terson reorganization cannot be computed on this record. It is clear, however, that since, at the most only 319 of the 386 total participants were non-vested (A. 1441), the percentage reduction in the number of non-vested participants was greater than 20% and, in all likelihood, substantially larger than that.

participants and since a 33% reduction in the number of participants resulting from a corporate reorganization must be considered a partial termination within the intendment of Congress, the District Court's decision is correct.

CONCLUSION

For the foregoing reasons, the United States as amicus curiae respectfully suggests that the petition for rehearing be granted and that the judgment of the District Court be affirmed.

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NOVEMBER 1990

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Supreme Court, U.S.
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No. 01-1059

IN THE

Supreme Court of the United States

ROBERT J. MATZ,
individually and on behalf of all others similarly situated,
Petitioner,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION
INVESTMENT PLAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Did the court below, after remand from this Court for reconsideration in light of *United States v. Mead Corp.*, 533 U.S. 218 (2001), correctly decide that the position stated in an *amicus curiae* brief submitted on behalf of the IRS to another court in a matter involving unrelated parties is entitled to respect, if at all, only under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)?

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IN THE

Supreme Court of the United States

No. 01-1059

ROBERT J. MATZ,
individually and on behalf of all others similarly situated,
Petitioner,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

The underlying case involves the question of whether fully vested pension plan participants should be counted in the numerator of the mathematical formula used for determining if a pension plan has been "partially terminated," as that term is used in Article 19.2 of the Household International Tax Reduction Investment Plan (the "Household Plan" or the "Plan"). In compliance with Sections 401(a)(7) and 411(d)(3)(A) of the Internal Revenue Code ("IRC"), 26 U.S.C. §§ 401(a)(7) and 411(d)(3)(A), the Household Plan contains a provision—Article 19.2—stating that the accounts of all participants will be fully vested upon the termination or partial termination of the Plan. Petitioner Robert J. Matz ("Matz") contends that a "partial termination" occurred and that, in accordance with Article 19.2 of the Household Plan,

the amount in his account in the Plan (and the accounts of others similarly situated) should have been fully vested when he (and the others) were laid off. His suit is for benefits allegedly due to him under the Household Plan pursuant to Section 502(a)(1)(B) of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), 29 U.S.C. § 1132(a)(1)(B).

When considering whether fully vested participants should be included in the numerator of the equation, the court below looked to the partial termination statute, IRC § 411(d)(3)(A). *See* Petition App. at 14a-16a. After finding that neither the statute nor its legislative history provided guidance on the question, the court then looked to the purposes of the statute, which it concluded were (1) to protect employees' legitimate expectation of pension benefits; and (2) to prevent employers from abusing pension plans to reap tax benefits. *Id.* It went on to find that including fully vested participants did not further either of these purposes and it therefore would be logical *not* to include them. Petition App. at 16a-17a.

In its first opinion in this case, the court below nevertheless held that fully vested participants should be included because that was the position taken in an *amicus curiae* brief submitted on behalf of the Internal Revenue Service ("IRS") in *Weil v. Retirement Plan Admin. Comm. of the Terson Co.*, 933 F.2d 106 (2d Cir. 1991) ("*Weil III*"). Petition App. at 18a. The *amicus* brief submitted on behalf of the IRS in *Weil III* argued that the position of the IRS "is that all terminated participants, both vested and non-vested, should be counted in determining whether a partial termination has occurred." Petition App. at 45a. In making this argument, the authors pointed to some Revenue Rulings and the "Plan Termination Handbook" contained in the Internal Revenue Manual. Petition App. at 46a-48a. The court below gave deference to the interpretation set out in the *amicus* brief in *Weil III* because it believed it was "constrained" to do so. Petition

App. at 18a. In so doing, it cited to the decision in *Weil III*, 933 F.2d at 107-08, which deferred to the *amicus* brief because of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). *Id.*

The Household Plan sought a writ of *certiorari* from this Court on the ground that it was improper to give *Chevron* deference to the *amicus* brief in *Weil III*. This Court vacated the Seventh Circuit's first opinion and remanded the case for further consideration in light of *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164 (2001) ("*Mead*"). *See* Petition App. at 8a.

On remand, the Seventh Circuit found that the position stated in the *amicus* brief in *Weil III* was entitled neither to judicial deference under *Chevron* nor to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) ("*Skidmore*"). *See* Petition App. at 1a-7a. It therefore held that fully vested participants should *not* be considered in the partial termination analysis. Petition App. at 6a.

Citing *Auer v. Robbins*, 519 U.S. 452 (1997) ("*Auer*") and *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 121 S. Ct. 1433 (2001) ("*Cleveland Indians*"), Matz now argues to this Court that the Seventh Circuit should have given *Chevron* deference to the position taken in the *amicus* brief in *Weil III* because the brief states the IRS's interpretation of an ambiguous Treasury Regulation (26 C.F.R. § 1.411(d)-2(b)(1)), as well as an ambiguous statute (IRC § 411(d)(3)). However, the court below was not interpreting the Treasury Regulation. Since the partial termination provision was included in the Household Plan because of IRC § 411(d)(3), the court below quite properly focused its attention on the statute. *See* Petition App. at 14a-19a & 6a.

Furthermore, Matz's proposed *Auer* test, which would involve a tripartite, to and fro analysis, is based upon a misreading of *Mead*, *Auer*, and *Cleveland Indians*. None of

those cases establishes a bright-line rule that an agency's interpretation of one of its own regulations is entitled to *Chevron* deference. To the contrary, the analysis used for determining if deference is due under *Chevron* or *Skidmore* is precisely the same whether the court is considering the interpretation of a statute or a regulation.

Both *Auer* and *Cleveland Indians* involved highly detailed regulatory schemes that established specific definitional tests and rules of the agency's own creation and informal agency pronouncements about how to apply those tests and rules in a particular circumstance. If a test or rule set out in a regulation contained in such a highly detailed regulatory scheme turns out to be ambiguous in a particular circumstance, it is logical for a court to defer to the longstanding interpretation of the agency that created the regulation so long as the agency's interpretation is a permissible one.

There is no similar situation here. The *amicus* brief in *Weil III* does not purport to state the IRS's interpretation of any specific definitional test or rule set out in any regulatory scheme, highly detailed or not. Instead, the *amicus* brief in *Weil III* purports itself to set out a definitional rule that fully vested participants always are to be considered when determining if a partial termination has occurred. Petition App. at 45a.

The IRS never has promulgated any regulations, let alone a highly detailed regulatory scheme, indicating how or when a pension plan should be deemed to have been "partially terminated." The *amicus* brief in *Weil III* was filed with the Second Circuit more than ten years ago. In the last decade, the IRS could have, but has not, issued a regulation (via formal notice and comment rulemaking) explaining how to determine if a qualified pension plan has been "partially terminated" and, if so, when the termination occurred. If it really is the IRS's considered judgment that (as stated in the *amicus* brief in *Weil III*) fully vested participants *always* are taken into account in

the partial termination determination, the IRS certainly could have said so in a regulation issued in the normal course. Such a regulation would be particularly welcome since the only IRS regulation on point is as vague as the statute. It says only that "[w]hether or not a partial termination . . . occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of plan amendment or severance by the employer, of a group of employees who have been previously covered by the plan . . . ." Treasury Regulation 1.411(d)-2(b)(1). There is no specific test or rule here. Instead, the Commissioner simply reserves the right to exercise his/her discretion to determine whether or not a partial termination occurs in a particular circumstance.

In that respect, the regulation at issue in this case is similar to the regulation at issue in *Mead*, which gave Customs' officials a broad grant of unfettered authority to issue tariff classification rulings for particular imports. *Mead*, 121 S. Ct. at 2168-69. Here, as in *Mead*, the regulation at issue provides no guidance whatsoever for making any determination. Accordingly, here, as in *Mead*, there is no reason to give *Chevron* deference to the agency's informal interpretation of the statute or the regulation.

RESTATEMENT OF THE CASE

A. The Household Plan:

The Household Plan is a defined contribution employee pension plan within the meaning of Sections 3(2)(A) and 3(34) of ERISA, 29 U.S.C. §§ 1002(2)(A) and 1002(34), and is intended to be a qualified profit sharing plan under IRC § 401(a).[1] Household International, Inc. ("Household")

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[1] Both the employer and the employees benefit if a plan qualifies under IRC § 401(a). Employers, within certain limits, are permitted to deduct

sponsors the Household Plan for the exclusive benefit of its employees and employees of its subsidiaries. Household makes matching contributions to the Household Plan on behalf of employees who elect to participate by making their own contributions.

Participants in the Household Plan are 100% vested in the amounts credited to their accounts that is attributable to their own contributions, regardless of length of service. However, until September 1995, the Plan contained a 5-year vesting schedule for employer matching contributions. Article 14.1 provided that a participant obtained a vested interest in the amount credited to his/her account attributable to Household's matching contributions at the rate of 20% per year, becoming fully vested in such amount after five years of service.[2] Under normal circumstances, if a participant's employment was terminated for reasons other than death, disability, or retirement, any unvested account balance was forfeited and used to reduce Household's future matching contributions.[3]

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contributions made to qualified plans for income tax purposes (whether or not the employees' interests are vested); earnings on the plans' assets are exempt from income tax; and employees defer payment of income tax on employer contributions made on their behalf until they actually receive amounts attributable to such contributions, generally after retirement when their incomes and, hence, applicable tax rates, tend to be lower. IRC §§ 402(a), 404(a), and 501, 26 U.S.C. §§ 402(a), 404(a), and 501.

[2] ERISA and the IRC expressly permit vesting within (or at) five years of service so that employers may reward employees with longer service over those with less service. *See* 26 U.S.C. § 411(a)(2); 29 U.S.C. § 1053(a)(2).

[3] The forfeiture of non-vested benefits to reduce employer matching contributions is expressly authorized by the Internal Revenue Code (26 U.S.C. §§ 401(a)(8) & 411(a)(2)) and ERISA (29 U.S.C. § 1053(a)(2)), and has been recognized as fostering the important goal of plan sponsorship. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 (1981).

As required by IRC § 411(d)(3), the Household Plan provided for full vesting if the Plan is terminated or partially terminated. Article 19.2 of the Plan states: "[I]n the case of the termination of the Plan by Household International, Inc. . . . or a partial termination of the Plan with respect to a group of participants, the account balance of each affected participant will become 100% vested."

B. Matz:

Matz was an employee of Hamilton Investments, Inc. ("Hamilton"), a wholly owned subsidiary of Household. He elected to make payroll contributions to the Household Plan and Household made matching contributions on his behalf. His employment at Hamilton was terminated on September 1, 1994, when Household sold substantially all of Hamilton's assets.

At the time of his termination, Matz was 60% vested in the amount credited to his Household Plan account attributable to Household's matching contributions. The remaining 40% (which was valued at $7,289.92) attributable to Household's matching contributions was forfeited. He received a distribution from the Household Plan in the amount of $27,914.10, the full amount of his vested account balances.

In September 1995, Household amended Article 14.1 to eliminate the 5-year vesting schedule, thereby making all participant accounts 100% vested regardless of a participant's length of service. From that point forward, all participant accounts were fully vested.

C. The Claim Matz Made To The Plan Administrator:

In March 1995, Matz sent a letter to the Administrative and Investment Committee of the Household Plan asking to be fully vested because:

> 1. For my part, I kept all goals and objectives as assigned to me at Hamilton Investments. I would have

> hoped to retire from Hamilton Investments or a division of Household International. In effect, the plan was terminated for myself and all other Hamilton employees.
>
> 2. I was almost vested and fell short by only a few months. I feel this should have been taken into consideration by Household or should be evaluated by the committee at the present time.

The Committee denied Matz's request. By letter dated April 5, 1995, the Committee advised Matz that it was required to apply the terms of the Household Plan equitably to all Plan participants and could not make exceptions to the vesting provisions of the Plan for individual participants who had not completed the requisite five years of service.

D. The Lawsuit:

In February 1996, Matz filed a complaint in the United States District Court for the Northern District of Illinois (on his own behalf and on behalf of all others similarly situated) for benefits allegedly due him (and others) under the Household Plan. In the proceedings below, Matz has alleged that the Household Plan was partially terminated over a period of years (September 1994 through May 1, 1996) and, therefore, pursuant to Article 19.2 of the Plan, the Plan should have fully vested his account in the Plan (and the accounts of others similarly situated) when he was (they were) laid off.

On November 24, 1997, the Household Plan and Matz jointly asked the district court to permit them to brief two legal issues, "the resolution of which the parties believe have the potential of narrowing the issues to be tried, or the class to be certified, and may even dispose of the litigation altogether, or a substantial portion of it." On December 22, 1997, the Household Plan moved for partial summary judgment on the first issue: whether participants whose employment was terminated after September 1995, when the Household Plan

was revised to give full vesting, should be considered when determining if a partial termination occurred, and included in the plaintiff class.[4]

On November 30, 1998, the trial court granted the Household Plan's motion to exclude from the purported class those participants whose employment was terminated after September 1995. However, it denied the Household Plan's motion to exclude such participants from the analysis of whether a partial termination occurred. Petition App. at 33a.

On November 30, 1999, the court granted the Household Plan's motion to certify the order of November 30, 1998, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Finding that an early resolution of the issue had the potential for disposing of this putative class action, the trial court certified the following issue for interlocutory review:

> Whether, for purposes of determining if the Plan was "partially terminated," the court's analysis should include fully-vested employees terminated after the 1995 Plan amendment.

On December 10, 1999, the Household Plan filed a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), which the Seventh Circuit granted on January 3, 2000. *See* Petition App. at 13a.

E. The Seventh Circuit's First Opinion:

The Seventh Circuit issued its first decision in this case on September 21, 2000. Petition App. at 9a. It affirmed the trial court's decision.

The court below reviewed the partial termination statute—IRC § 411(d)(3)—and its legislative history and concluded that neither provides a clear standard for determining if a partial termination has taken place. Petition App. at 14a-15a.

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[4] The second issue is not material to the pending Petition and therefore is not discussed herein.

Observing that courts have "generally understood" the purpose of IRC § 411(d)(3) to be: (1) to protect employees' legitimate expectation of pension benefits; and (2) to prevent employers from abusing pension plans to reap tax benefits, the court then said it agreed with the Household Plan that counting fully vested participants would further neither of these purposes:

> From a policy standpoint, the Plan makes a logical argument. Vested participants do not need further protection for their pension benefits and do not benefit from a finding of partial termination. Their benefits, by virtue of vesting, are non-forfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non-forfeitable. *We agree with the Plan's arguments.*

Petition App. at 16a-17a (emphasis added).

The Seventh Circuit nevertheless held that fully vested participants should *not* be excluded from the analysis in this case because the court was "constrained" to give deference to the position taken in an *amicus* brief submitted on behalf of the IRS in *Weil III*. Petition App. 18a. In deferring to the position taken by the IRS in the *amicus* brief, the court below cited *Weil III* for the proposition that it was required to defer to the IRS if its position was "reasonable." *Id.*

On October 5, 2000, the Household Plan filed a petition for rehearing with suggestion for rehearing *en banc* and asked the court below to take judicial notice of the *amicus* brief submitted on behalf of the IRS in *Weil III*. The court below denied the petition for rehearing (Petition App. at 34a-35a) and the motion for judicial notice.

F. The Remand By This Court:

The Household Plan filed a petition for a writ of *certiorari* on February 5, 2001. At the Plan's suggestion, the Court held the petition until after it issued its decision in *Mead* and then

vacated the Seventh Circuit's first decision and remanded it for further proceedings in light of *Mead*. *See* Petition App. at 8a.

G. The Seventh Circuit's Opinion On Remand:

On remand, the court below found that the *amicus* brief was not worthy of judicial deference under *Chevron* and also was not entitled to respect under *Skidmore*. When considering the possible application of *Chevron* deference, it observed that the position taken by the IRS in the *amicus* brief in *Weil III* was supported only by Revenue Rulings and the IRS's position in the Plan Termination Handbook contained in the Internal Revenue Manual. Petition App. 3a-4a. It further observed that "[t]he IRS's position in the *amicus* brief was not born from a formal policymaking procedure" and stated:

> We do not believe that a position set forth in an *amicus* brief, supported by some Revenue Rulings and an agency manual are formal enough to warrant *Chevron* treatment. . . . . Upon reading *Mead*, we find that a litigation position in an *amicus* brief, perhaps just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals, and enforcement guidelines, . . . are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*.

Petition App. at 5a.

Having found *Chevron* deference inapplicable, the court then considered whether the *amicus* brief in *Weil III* was entitled to respect under *Skidmore*. After noting that any respect given to the *amicus* brief under *Skidmore* would depend on its thoroughness, validity, consistency, and persuasiveness, the court reasoned as follows:

> As noted, in our first opinion, although we found the IRS' position reasonable under *Chevron*, we also found it unpersuasive. As we noted, the meaning of "partial

> termination" is unclear because the statutory language is ambiguous, the Treasury Regulation is not helpful, the statutory framework offers no assistance, and the legislative history provides little more guidance. *See Matz*, 227 F.3d at 974. Thus, we looked to the statute's purposes, which are to protect employees' legitimate expectation of pension benefits and to prevent employers from abusing pension plans to reap tax benefits. *See id.* at 975. We agree with the Plan that counting vested participants "would further neither of these purposes." *Id.* "Vested participants do not need further protection for their pension benefits and do not benefit from a finding of partial termination. Their benefits, by virtue of vesting, are nonforfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non[ ]forfeitable." *Id.* We agreed with the notion voiced in *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989)[, *aff'd on other grounds*, 914 F.2d 83 (5th Cir. 1990)] and *Weil* [*III*] that perhaps only non-vested participants ought to be counted, although neither court so held. Since we indicated that if we were writing on a blank slate we would have held differently, we now adopt the rule that only non-vested participants should be counted in determining whether partial termination of a pension plan has occurred.

Petition App. at 5a-6a.

The Seventh Circuit issued its second decision on September 7, 2001. Approximately two weeks later, on September 21, 2001, Matz filed a motion asking the court to take judicial notice of the *amicus* brief in *Weil III*, as well as a petition for rehearing with suggestions for rehearing *en banc*. On September 25, 2001, the Seventh Circuit granted the motion for judicial notice, but denied the petition for rehearing.[5]

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[5] Matz's Petition does not include copies of these orders.

THE PETITION SHOULD BE DENIED

I. THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION IN *WEIL III* WILL CONFUSE NO ONE.

In its first opinion in this case ("*Matz I*"), the Seventh Circuit followed the decision of the Second Circuit in *Weil III*. Like the court in *Weil III*, it gave *Chevron* deference to the position stated in the *amicus* brief in *Weil III*.

In its second opinion in this case ("*Matz II*"), the court below disagreed with *Weil III* and explained that the difference between its first and second opinions was due to the fact that this Court's decision in *Mead* had clarified the situations in which *Chevron* deference is proper. *Mead* is the law now and, in light of *Mead*, *Matz II* clearly is correct and *Weil III* clearly is wrong. *Weil III* was decided before *Mead* under the wrong standard of judicial deference.

No plan administrator—in the Second Circuit or elsewhere—is going to follow *Weil III* now that there is *Matz II*. *Matz II* settles the law on this point.[6] It now is

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[6] *Matz II* is consistent with *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985), and *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1165 (S.D. Tex. 1991), *aff'd on other grounds sub nom. Borst v. Chevron*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995). The only other reported cases addressing the issue of whether fully vested participants should be considered in a partial termination analysis are *Halliburton Co. v. Commissioner*, 100 T.C. 216 (1993), *aff'd without opinion*, 25 F.3d 1043 (5th Cir.), *cert. denied sub nom. Nash v. Halliburton Co.*, 513 U.S. 989 (1994), and *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989), *aff'd on other grounds*, 914 F.2d 83 (5th Cir. 1990). *Halliburton* left the issue unresolved (100 T.C. at 243-44) and the *Morales* court relied without analysis upon the trial court's second opinion in *Weil*, which was reversed in *Weil II*, which was reversed in *Weil III*. *See Weil v. Retirement Plan Admin. Comm. for the Terson Co.*, 1988 WL 64862 (S.D.N.Y. 1988), *rev'd*, 913 F.2d 1045 (2d Cir. 1990) ("*Weil II*"), *vacated and rev'd on this point*, 933 F.2d 106 (2d Cir. 1991) ("*Weil III*").

evident to one and all that fully vested participants should be excluded when deciding if a partial termination has occurred.

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

A. The Decision Below Is Consistent With *Mead*, *Chevron*, and *Skidmore*.

The concept of a "partial termination" comes from IRC § 411(d)(3), which declares that a plan is not "qualified" under IRC § 401(a) unless the plan provides that, "upon its termination or partial termination, . . . the rights of all affected employees to benefits accrued to the date of such termination [or] partial termination, . . . to the extent funded as of such date, or the amounts credited to the employees' accounts, are non-forfeitable." IRC § 411(d)(3). The Household Plan contains a partial termination provision because of this statute.

Federal courts consistently have held that a partial termination occurs if there has been a permanent reduction of a "significant percentage" of plan participants because of a major corporate event. *See, e.g., Administrative Comm. of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson*, 164 F.3d 981, 987 (6th Cir. 1999), *cert. denied*, 528 U.S. 114 (2000) ("*Sea Ray*").[7] When making

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[7] *See also Halliburton Co. v. Commissioner*, *supra*, 100 T.C. at 234-36; *Sage v. Automation Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988); *Kreis v. Charles Townley, M.D. & Associates*, 833 F.2d 74, 79 (6th Cir. 1987); *Babb v. Olney Paint Co.*, *supra*, 764 F.2d at 243-45; *Weil v. Retirement Plan Admin. Comm. for the Terson Co.*, 750 F.2d 10, 12-13 (2d Cir. 1984) ("*Weil I*"); *Collignon v. Reporting Services Co.*, 796 F. Supp. 1136, 1141 (C.D. Ill. 1992); *In re Gulf Pension Litigation*, *supra*, 764 F. Supp. at 1168; *Tipton & Kalmbach*,

this analysis, courts routinely exclude various kinds of participants from the numerator of the partial termination equation. *See, e.g., Halliburton*, 100 T.C. at 238, 245-49. They exclude those who died, retired at normal retirement age, voluntarily resigned, were terminated for cause or because of disabilities, were transferred to successor plans, or were rehired shortly after being laid off. *See id.*; *Sea Ray*, 164 F.3d at 988; *Sage*, 845 F.2d at 891; *Kreis*, 833 F.2d at 81-83; *Weil I*, 750 F.2d at 13; *In re Gulf Pension Litigation*, 764 F. Supp. at 1168. The *Halliburton* court explained that it was proper to exclude from the numerator those who died, retired at normal retirement age, or were terminated for cause because:

> The discontinuance of such employees' participation in the plan is deemed not to be attributable to Halliburton's reductions in force, and so such employees are deemed not to have been affected by such action. . . . Moreover, the account balances of employees who died or retired at normal retirement age were *fully vested* upon occurrence of such events.

100 T.C. at 238 (emphasis added).

The question presented to the court below was whether other fully vested participants also should be excluded. This question is particularly important in this case because Matz claims that the Household Plan was partially terminated as a result of allegedly "related" corporate events occurring between September 1, 1994, and May 1, 1996, and the Household Plan was amended during that period—in

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Inc. v. Commissioner, 83 T.C. 154 (1984); *Morales v. Pan Am. Life Ins. Co., supra.*

As the Third Circuit observed in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 151 (3d Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989), the appropriate focus of the inquiry is the "percentage of employees in the plan who were affected by the transaction said to constitute a partial termination."

September 1995—to fully vest the accounts of all participants. Thus, the accounts of all participants whose employment was terminated after September 1995 were fully vested. The court below was faced with a unique situation. No other court has addressed the impact of a plan amendment fully vesting all plan participants midway through the period in which the plaintiff claims a partial termination occurred.

The only courts that have given deference to the position taken in the *Weil III amicus* brief are the Seventh Circuit in *Matz I* and the Second Circuit in *Weil III*. Petition App. 17a-18a; *Weil III*, 950 F.2d at 110. Both gave deference to the *amicus* brief only because they erroneously concluded that deference was required by *Chevron*. Petition App. 3a; *Weil III*, 950 F.2d at 107-110.

After this Court vacated *Matz I* and remanded the case for further proceedings in light of *Mead*, the court below correctly found that the *amicus* brief in *Weil III* is not entitled to deference under *Chevron*. It is not the product of formal notice and comment rulemaking or any IRS adjudicatory procedure. Moreover, the only authority cited in the *amicus* brief that specifically supports the IRS's position on the issue of counting fully vested participants is the Internal Revenue Manual. Under *Mead*, 121 S. Ct. at 2173-75, and *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), agency manuals are not entitled to *Chevron* deference. It would be strange and illogical if the act of citing the Internal Revenue Manual in a litigation brief accorded the Internal Revenue Manual greater stature than it would have on its own.[8]

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[8] The *amicus* brief also included the IRS's interpretations of two Revenue Rulings, Rev. Rul. 72-439, 1972-2 C.B. 223, and Rev. Rul. 81-27, 1981-1 C.B. 228, neither of which addresses the issue of counting or not counting fully vested plan participants, or whether any fully vested participants were involved in the partial terminations at issue in those rulings. Since, in addition, Revenue Rulings do not have the force or effect of law and do not bind the courts, they should be accorded no

In declining to grant the *amicus* brief deference under *Chevron*, the court stated that it did not "believe that a position set forth in an *amicus* brief, supported by some Revenue Rulings and an agency manual are formal enough to warrant *Chevron* treatment." Petition App. at 4a-5a. The court correctly found that the *amicus* brief in this case was the functional equivalent of the classification ruling at issue in *Mead*:

> In *Mead*, the court declined to give *Chevron* deference to a tariff classification ruling issued by the United States Customs Service. 121 S. Ct. at 2174. The Court explained that deference was not due because Congress did not indicate that it meant to delegate authority to Customs to issue classification rulings with the force of law, Customs did not engage in notice-and-comment practice when issuing the rulings, and they were not binding on third parties. *See id.* We do not consider a position in an *amicus* brief to be more deserving of *Chevron* deference than a tariff classification ruling. Upon reading *Mead*, we find that a litigation position in an *amicus* brief, perhaps just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals and enforcement guidelines, *see id.* at 2175, are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*.

Petition App. at 5a. The court below correctly concluded that the *amicus* brief in *Weil III*, like the classification ruling at issue in *Mead*, therefore is best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines," and thus "beyond the *Chevron* pale." *Mead*, 121 S. Ct. at 2175.

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weight (*see Davis v. United States*, 494 U.S. 472, 484 (1990)); their inclusion in an *amicus* brief does not alter this.

The court below also correctly concluded that the *amicus* brief in *Weil III* is not entitled to respect under *Skidmore*. In its view, the position taken in the *amicus* brief is not persuasive. Indeed it is not! The *amicus* brief states the IRS's position on a matter at issue in the *Weil* litigation matter. It is argumentative and, in it, the IRS is forced to say that equally "official" pronounce-ments of the IRS are wrong. It states that a determination letter issued by a local IRS district office "did not represent the IRS's position then and hence was issued erroneously." Petition App. at 48a. It also states that an IRS Agent who testified under oath that the IRS focuses on the percentage of non-vested terminatees was "misinformed as to the IRS's actual position." Petition App. at 50a n.6.[9] Moreover, the position taken in the *amicus*

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[9] The courts in *Weil v. Retirement Plan Admin. Comm. for the Terson Co.*, 913 F.2d 1045 (2d Cir. 1990) ("*Weil II*"), *vacated and rev'd*, 933 F.2d 106 ("*Weil III*"), and *Weil III* noted the following inconsistencies in positions taken by the IRS:

- in a determination sent to the plan in 1981, the IRS had considered only non-vested participants in concluding that no partial termination had occurred (*Weil III*, 933 F.2d at 110);
- an IRS agent had testified at deposition that the IRS, when examining the percentage of terminated participants, focuses on the percentage of participants discharged without vested benefits (*Weil II*, 913 F.2d at 1051); and
- Form 5310, which a pension plan can use to request a determination from the IRS as to whether a pension plan has been partially terminated, asks an employer to provide, in addition to the total number of participants terminated, the number of participants terminated without full vesting (*Weil II*, 913 F.2d at 1051 n.2).

In previous briefs in this case, Matz has asserted that IRS Form 5310 is not material since the accompanying instructions advise the reader to use IRS Form 5300, not IRS Form 5310, when seeking a "partial termination" determination from the IRS. This is a quibble. IRS Form 5300 also asks one seeking a "partial termination" determination to tell the IRS the number of participants terminated without full vesting.

brief—that "all terminated participants, both vested and non-vested, should be counted in determining whether a partial termination has occurred" (Petition App. at 45a)—purports to state a rule applicable in every circumstance. It therefore is flatly inconsistent with the Treasury Regulation, which requires the Commissioner to consider "all the facts and circumstances" in a particular case when deciding if a partial termination has occurred. Treasury Regulation 1.411(d)-2(b)(1). In addition, as explained by the court below, the position taken in the *amicus* brief does not further the goals of the statute. Petition App. at 16a-18a. *See also* Petition App. at 5a-6a.

B. The Decision Below Is Consistent With *Mead*, *Auer*, and *Cleveland Indians*.

Asserting that the *amicus* brief in *Weil III* states the IRS's interpretation of an ambiguous Treasury Regulation (26 C.F.R. § 1.411(d)-2(b)(1)), as well as the ambiguous statute (IRC § 411(d)(3)), Matz argues that the court below was obliged to defer to the *amicus* brief under *Auer*. In making this argument, Matz fails to understand the standards set forth in *Mead*, *Auer* and *Cleveland Indians*.

None of those cases makes any distinction between the analysis appropriate for an agency's interpretation of a regulation, rather than a statute. Indeed, *Mead* itself involved two regulations—19 C.F.R. § 177.8 and 19 C.F.R. § 177.9—as well as a statute—the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202 (the "HTSUS"). The regulations authorized the Secretary of the Treasury to issue "ruling letters" setting tariff classifications for particular imports (19 C.F.R. § 177.8) and stated that:

> A ruling letter represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In

> the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances.

19 C.F.R. § 177.9(a).

The Court in *Mead* held that ruling letters issued by Customs officials pursuant to these regulations are not entitled to judicial deference under *Chevron*. In so doing, it explained:

> [W]hether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. . . . . The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position, *see Skidmore*, *supra*, at 139-140 . . . . This approach has produced a spectrum of judicial responses, from great respect at one end . . . to near indifference at the other . . . .
>
> "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." [*Skidmore*,] 323 U.S., at 140 . . . .

Mead, 121 S. Ct. at 2171-72 (citations and footnotes omitted).

The *Mead* Court went on to explain that *Chevron* deference is appropriate for "a category of interpretive choices

distinguished by an additional reason for judicial deference." *Mead*, 121 S. Ct. at 2172. One kind of interpretive choice that clearly qualifies for *Chevron* deference is a regulation issued after public notice and comment pursuant to a statutory grant of authority to define a specific provision of a statute. As explained in *Mead*,

> [W]hen Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron*, 467 U.S., at 843-844, 104 S. Ct. 2778, and any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

Id. at 2171. *Chevron* deference also is appropriate where Congress did not expressly delegate authority or responsibility to implement a particular provision or to fill a particular gap, but it nevertheless is apparent to the court that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law. *Id.* at 2172.

In *Mead*, this Court held that *Chevron* deference clearly is not appropriate for ruling letters issued by Customs pursuant to the applicable regulations. *Id.* at 2173. First, the HTSUS did not indicate that Congress meant to delegate authority to Customs to issue classification rulings with the force of law. *Id.* at 2174. Second, the ruling letters were regarded by Customs as not binding on third parties; to the contrary, Customs viewed them as binding only on itself and the importer to whom they are issued and, even then, only until Customs has given advance notice of intended change. *Id.* In addition, "[s]ince ruling letters respond to transactions of the moment, they are not subject to notice and comment before being issued, may be published but need only be made 'available for public inspection,' 19 U.S.C. § 1625(a), and . . .

could be modified without notice and comment under most circumstances." *Mead*, 121 S. Ct. at 2169. The ruling letter at issue in *Mead* set out a rationale in some detail, but many ruling letters contain little or no reasoning. *Id.*

Both *Auer* and *Cleveland Indians* involved circumstances that were quite different from the situation in *Mead* and that entitled the agency interpretation to deference under *Chevron*. Both involved highly detailed regulatory schemes that establish specific definitional tests and rules. Because such tests and rules cannot possibly anticipate every fact or circumstance that might arise in their application, the agency of necessity must interpret them when applying them to the facts and circumstances of a particular situation. The agency's application of such regulations in a consistent manner over time represents the agency's understanding of the tests and rules that are set out in its own regulations.

In *Auer*, this Court gave *Chevron* deference to an agency pronouncement contained in an *amicus curiae* brief filed by the Secretary of Labor at the request of the Court. The *amicus* brief explained the Secretary of Labor's interpretation of the "salary basis" test set out in 29 C.F.R. § 541.118(a), as applied to public sector employees. That regulation is one of many issued by the Department of Labor ("DOL") pursuant to Congress's express delegation of authority to "defin[e] and delimi[t]" the scope of the exemption from overtime compensation for *bona fide* executive, administrative, and professional employees. 29 U.S.C. § 213(a)(1). It provides that an employee is not paid on a salary basis if the salary is "subject to" reduction for penalties imposed for disciplinary reasons (other than for infractions of safety rules of major significance). *Auer*, 519 U.S. at 456. The *amicus* brief explained that the DOL interprets the "subject to" language of the salary basis test to deny exempt status to employees covered by a policy permitting disciplinary or other deductions in pay that creates a "significant likelihood" that

such deductions will be made "as a practical matter." *Auer*, 519 U.S. at 461. This Court gave *Chevron* deference to the position in the *amicus* brief after noting that the Secretary's interpretation of the "subject to" language was reasonable and that, "[b]ecause the salary basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotations omitted). The Court also noted that there was no reason to suspect that the interpretation did not reflect the agency's fair and considered judgment on the matter in question. *Id.* at 462.

Cleveland Indians involved the application to backpay of the IRS's long-held regulations interpreting the tax provisions of the Federal Insurance Contributions Act, 26 U.S.C. § 3111(a) ("FICA"), and the Federal Unemployment Tax Act, 26 U.S.C. § 3301 ("FUTA"). Those regulations—29 C.F.R. §§ 31.3111-3, 31.3111-2(c), 31.3301-2, and 31.3301-3(b)—specify that FICA and FUTA taxes "attach[ ] at the time that the wages are paid" by the employer and are "computed by applying to the wages paid by the employer the rate in effect at the time such wages are paid." *Cleveland Indians*, 121 S. Ct. at 1444. Although the regulations do not expressly address backpay, the IRS has consistently interpreted them to require taxation of back wages according to the year the wages are actually paid, regardless of when those wages were earned or should have been paid. *Id.* In holding that, for FICA and FUTA tax purposes, backpay should be attributed to the year in which it actually was paid, this Court gave deference to the IRS's consistent past interpretation of its own regulations:

> Echoing the language in [FICA and FUTA], these regulations have continued unchanged in their basic substance since 1940. . . .

> Although the regulations, like the statute, do not specifically address backpay, the [IRS] has consistently interpreted them to require taxation of back wages according to the year the wages are actually paid, regardless of when those wages were earned or should have been paid. . . . . Because that interpretation is reasonable, it attracts substantial judicial deference. . . . . We do not resist according such deference in reviewing an agency's steady interpretation of its own 61-year-old regulation implementing a 62-year-old statute.

Id. at 1444-45.

In *Auer* and *Cleveland Indians*, the regulations being construed—unlike the regulation Matz cites here or the regulations at issue in *Mead*—provided specific tests, rules and standards. The IRS has yet to promulgate such implementing regulations for determining whether a partial termination of a pension plan has occurred. Here, the cited regulations do not provide any specifics to be applied to particular facts or circumstances. The regulation simply states that the Commissioner will consider "all the facts and circumstances in a particular case" and then identifies one factor to be considered. *See* Treasury Regulation § 1.411(d)-2(b)(1). It does not purport to explain how a "partial termination" is to be determined and gives no clue as to what percentage of excluded employees constitutes a partial termination or which employees, only partially vested or also fully vested, to include in that group. The Treasury Regulation cited by Matz is not the equivalent of the regulations at issue in *Auer* and *Cleveland Indians*, and the *amicus* brief in *Weil III* was not interpreting a rule that is "a creature of the [agency's] own regulations." *See Auer*, 519 U.S. at 461. Indeed, Matz is asking this Court to treat the position taken in the *amicus* brief as if the brief itself were a valid substitute for specific language in a regulatory rule.

Auer and *Cleveland Indians* presented much stronger cases for heightened deference than that presented here. Both cases involved agency interpretations of specific, detailed regulations; here, the *Weil III amicus* brief at most advanced a position with respect to a regulation that mirrored the ambiguity found in the statute. Furthermore, in *Auer* and *Cleveland Indians*, the agency position addressed the specific factual situation confronting the Court; here, the agency position was set forth in an *amicus* brief addressing a completely different set of facts.[10]

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

Matz cites Court of Appeals cases in which courts gave great weight to agencies' informal interpretations of their own regulations.[11] These cases are readily distinguishable from this one on at least two grounds. First, in each of the cited

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[10] The *amicus* brief in *Weil III* did not address the situation before the Court. It did not consider a situation where, as here, all plan participants became fully vested part-way through the period in which the partial termination allegedly occurred. Moreover, in the amicus brief in *Weil III*, the IRS said it requested (on Form 5310) the number of non-fully-vested participants because "if all of the terminated participants are vested, the question whether there has been a partial termination would be a moot point, since the benefits of terminated vested participants are nonforfeitable regardless of whether there has been a partial termination." Petition App. at 49a. This language suggests that the IRS's position in this case might very well be different from the position it took in *Weil III*. After all, the applicable regulation requires the Commissioner to consider "all the facts and circumstances" of each particular case.

[11] Matz cites *American Express Co. v. United States*, 262 F.3d 1376, 1382-83 (Fed. Cir. 2001); *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776 (6th Cir. 2000); *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000); *Falken v. Glynn County*, 197 F.3d 1341 (11th Cir. 1999); *Jones v. American Postal Workers Union*, 192 F.3d 417 (4th Cir. 1999); and *Foothill Presbyterian Hosp. v. Shalala*, 152 F.3d 1132 (9th Cir. 1998).

cases, the Court of Appeal was grappling with an interpretation of a longstanding and highly detailed regulatory scheme setting out specific definitional tests, rules, and exemptions. None of them involved the sort of vague generalities presented by the regulation at issue in the instant case.

Also, in each of those cases, it is clear that Congress left a gap in the statute for the agency to fill and that the agency exercised that authority. For instance, in *Falken v. Glynn County*, the court was confronted with the applicability of the "fire protection activities" exemption to the general presumption that all workers are entitled to overtime pay for hours worked in excess of 40 in a week. Although the statute set forth the exemption, it did not define the term "fire protection activities," thus leaving a gap to be filled by the DOL. Armed with this delegation of authority, the DOL promulgated an extensive and detailed series of regulations setting forth not only the definition of "fire protection activities" in a four-part test, 29 C.F.R. § 553.210(a), but also creating three related tests for determining whether an employee falls under the exemption. 29 C.F.R. §§ 553.212 and 553.215. In deciding an issue arising under one of these three tests, the court properly deferred to an interpretation of the test in an opinion letter previously issued by the DOL.[12] *Id.* at 1349-50.

When this Court issued its decision in *Mead*, it was well aware that lower courts would be called upon to make "reasoned choices" when determining the level of deference to be accorded to particular agency actions: "It is, of course, true that the limit of *Chevron* . . . itself is a good example showing when *Chevron* deference is warranted, while this

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[12] The test at issue in *Falken* was called the "80/20 test." It provided that employees who otherwise would be exempt under the "fire protection activities" exemption, would lose that exemption if they spent more than 20 percent of their time on nonexempt activities. 29 C.F.R. § 553.215.

is a good case showing when it is not. Judges in other, perhaps harder, cases will make reasoned choices between the two examples, the way courts have always done." *Mead*, 121 S. Ct. at 2176 n.18. The fact that other courts, including the court below, have made these reasoned choices is not a basis for granting *certiorari*.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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No. 01-1059

IN THE

Supreme Court of the United States

ROBERT J. MATZ, Individually and on Behalf of All Others Similarly Situated,

Petitioner,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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I. THE RULE GIVING DEFERENCE TO AN AGENCY'S INFORMAL REGULATORY INTERPRETATION IS NOT LIMITED TO ONLY THOSE SITUATIONS WHERE THE REGULATORY SCHEME IS HIGHLY DETAILED.

For the first time, Respondent argues that this Court's well-established rule that an agency's reasonable and consistently held interpretation of its own ambiguous regulation is controlling and should be given substantial deference applies *only* when the regulatory scheme is lengthy, "highly detailed," and establishes "specific definitional tests and rules." Response, p. 22. There is absolutely *no* basis for this argument, as this Court has never stated, indicated or even implied that its stated standard of deference apply only when the regulatory scheme at issue is highly detailed and provides specific definitional tests and rules.[1] The proposition that this Court *actually* meant for deference to be granted only in the circumstances suggested by Respondent – although there is not a scrap of evidence in any of this Court's decisions to support such a proposition – is incredulous. Petitioner presumes that had this Court intended such a standard of deference, this Court would have actually said so in one of the many decisions addressing this issue. The fact that this Court has never adopted this standard is concrete and irrefutable proof that it does not exist.

Rather, the only requirements placed on the rule's applicability are that (i) the regulation be ambiguous as to

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1. Indeed, Petitioner submits that such a test would be highly subjective and would provide a court with virtually no standards. Because every court could feasibly have a different opinion as to what constitutes "highly detailed," there could be innumerable conflicting interpretations of the same regulation.

the issue in question, (ii) the agency's interpretation be reasonable, and (iii) the agency's interpretation be consistent with previous agency rulings. *United States v. Cleveland Indians Baseball Co.*, 352 U.S. 200, 220-21, 121 S. Ct. 1433 (2001); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905 (1997); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381 (1994); *Stinson v. United States*, 508 U.S. 36, 44, 113 S. Ct. 1913 (1993).

This test is easily met here. First, the partial termination regulation does not address whether fully vested participants are included in a partial termination analysis, and, as the Seventh Circuit previously found, it is ambiguous on this issue. App. 6a, 18a. Second, as was also previously found by the Seventh Circuit, the Internal Revenue Service's ("IRS") interpretation, which requires the inclusion of all terminated plan participants in the partial termination analysis, is reasonable. App. 18a-19a. Finally, the IRS' interpretation has been consistently applied since 1990, with no challenge by any party (other than Respondent) or ruling letter, opinion or case holding to the contrary. *Weil v. Retirement Plan Admin. Comm. of the Terson Co., Inc.*, 933 F.2d 106, 110 (2d Cir. 1991);[2] Internal Revenue Manual, Subsection 7753 § 252(7) (1990).

Because the IRS' interpretation meets all of the above requirements, it should control and should have been deferred to by the Seventh Circuit. The failure to defer to the IRS' interpretation of its own regulation would allow litigants to challenge the IRS' administration of the tax laws, including

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2. Despite Respondent's continued implication to the contrary, the IRS was not a litigant in *Weil*. Rather, the Second Circuit specifically requested that the IRS submit an *amicus curiae* brief to provide the Court with the IRS' interpretation, and analysis and reasoning of that interpretation, of the partial termination statute and partial termination regulation. *Weil*, 933 F.2d at 107.

its regulatory interpretations, down to the minutia.[3] Clearly, this is a far-reaching issue which needs to be resolved by this Court.[4]

II. EVEN IF THE RULE APPLIES ONLY TO HIGHLY DETAILED REGULATORY SCHEMES, THE REGULATION AT ISSUE MEETS THAT STANDARD.

Even if this Court did intend for the rule to apply only where the regulatory scheme at issue is highly detailed and specific, the partial termination regulation here meets those requirements since it is not substantively different in scope and depth than the regulations at issue in *Auer* or *Cleveland Indians*. Furthermore, to assert that the regulatory scheme governing qualified benefit plans is *not* lengthy or highly detailed and does not establish specific definitional tests and rules is preposterous.

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3. Every detail of the IRS' interpretation will be open to dispute. For example, despite the Seventh Circuit holding to the contrary (App. 7a), Respondent *continues* to argue that involuntarily terminated fully vested plan participants are excluded from the numerator, but included in the denominator, of the partial termination analysis. This argument, and Respondent's willingness to keep pressing it, is further evidence that the details and interpretation of a regulation are better left to the agency who drafted the regulation. Otherwise, numerous different rules will be spawned by the same regulatory language.

4. Petitioner respectfully suggests that because the IRS' ability to effectively administer the tax laws is impacted by the issues raised herein, this Court consider inviting the IRS to file an *amicus curiae* brief in order to aid the Court in its consideration of the Petition for a Writ of Certiorari.

In *Auer*, the relevant statute provided that certain types of employees were exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA"). The relevant regulations provided that to be exempt, the employee must be paid on a salary-basis, and further provided that an employee is not paid on a salary-basis if the salary is "subject to" reduction for variations in quality or quantity of work performed. *Auer*, 519 U.S. at 455. Thus, the regulation sets forth a "salary-basis" test, along with the elements to be considered in the test. That is the depth, scope and detail of the regulation at issue in *Auer*. In its *amicus curiae* brief to this Court in *Auer*, the U.S. Department of Labor ("DOL") set forth its interpretation with regard to one element, *i.e.*, the "subject to" element, of the test. *Id.* at 461. This Court stated that because the "salary-basis" test was a creature of the DOL's own regulation, the DOL's interpretation was controlling unless plainly erroneous or inconsistent with the regulation. Finding that the interpretation was reasonable, this Court deferred to the DOL's interpretation of the "subject to" element of the test. *Id.*[5]

The partial termination regulation is similar to the *Auer* regulation in depth, scope and detail. The partial termination regulation provides that whether or not a partial termination of a qualified plan occurs shall be determined with regard to "all the facts and circumstances." Treasury Regulation

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5. The regulations at issue in *Cleveland Indians* provide even *less* depth, scope and detail, yet this Court still granted deference. There, the regulations provided that the employer tax attaches "at the time that the wages are paid." *Cleveland Indians*, 532 U.S. at 219. The regulations set forth no elements or circumstances to consider, but just set forth this basic rule. The IRS had issued informal rulings as to when backpay would be considered "paid," and this Court granted deference to those rulings. *Id.* at 220.

§ 1.411(d)-2(b)(1). The partial termination regulation goes on further to set forth some of the elements which are to be considered, one of which is "the exclusion, by reason of . . . severance by the employer, of a group of employees who have been previously covered by the plan." *Id.* Thus, the partial termination regulation sets forth a "facts and circumstances" test, along with the elements to be considered in the test. In its *amicus curiae* brief to the *Weil* Court, the IRS set forth its interpretation with regard to one element of the test – whether the term "group of employees who have been previously covered by the plan" includes vested as well as non-vested employees. Similar to the DOL rule at issue in *Auer*, the IRS rule at issue here answers a specific narrow question on a specific narrow issue. Here, the matter at issue under the regulation (*i.e.*, whether vested employees are counted in the partial termination analysis) is as specific and detailed as the matter at issue in *Auer*.

The "facts and circumstances" test set forth in the partial termination regulation is a creature of the IRS' own regulation. Therefore, the IRS' interpretation (as set forth in the *amicus curiae* brief) of one element of the test described in the regulation is, under this Court's jurisprudence, controlling unless plainly erroneous or inconsistent with the partial termination regulation – which it is not.

III. THIS COURT'S DECISIONS IN *MEAD*, *AUER* AND *UNITED STATES v. CLEVELAND INDIANS BASEBALL CO.* DISTINGUISH BETWEEN THE DEFERENCE ACCORDED TO AN AGENCY'S INTERPRETATION OF A REGULATION AND THAT ACCORDED TO AN AGENCY'S INTERPRETATION OF A STATUTE.

Respondent argues further – for the first time – that neither *United States v. Mead*, 533 U.S. 218, 121 S. Ct. 2164 (2001), *Auer* nor *Cleveland Indians* "makes any distinction between the analysis appropriate for an agency's interpretation of a regulation, rather than a statute." Response, p. 19. Such an argument is completely without merit and contrary to the express language of *Mead*, *Cleveland Indians* and *Auer*.

Although Respondent claims that *Mead* involved the construction of two regulations and a statute, that simply is not true. In *Mead*, the issue was whether the tariff classification made by the U.S. Customs Service ("Customs Service") under the Harmonized Tariff Schedule of the United States ("HTSUS"), 19 U.S.C. § 1202, was entitled to judicial deference. *Mead*, 121 S. Ct. at 2168. The Customs Service had issued a letter ruling determining that the imports at issue fell within a certain tariff classification under the HTSUS. In response to the importer's challenge of the classification, the Customs Service invoked *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), asserting that its interpretation of the HTSUS, as set forth in the letter ruling, deserved *Chevron* deference. In its analysis, this Court focused solely on the issue of statutory interpretation, and, as specifically emphasized by Justice Scalia in his dissent, did *not* disturb this Court's

previous ruling that an agency's interpretation of its own ambiguous regulation was entitled to deference. *Mead*, 121 S. Ct. at 2171, 2181. Clearly, the *Mead* Court distinguished between regulatory and statutory interpretations.

Furthermore, although Respondent asserts that *Mead* involved the interpretation of two regulations – 19 C.F.R. § 177.8 and 19 C.F.R. § 177.9 – that also is not true. These regulations merely give the Customs Service the authority to issue letter rulings setting tariff classifications under the HTSUS. *Mead*, 121 S. Ct. 2168-69. The letter ruling at issue in *Mead*, the issuance of which was expressly authorized under the regulations, interpreted the provisions of the *statute*, not the regulations.

Respondent further asserts that neither *Cleveland Indians* nor *Auer* distinguish between the standard of deference to be given to an interpretation of a statute and that to be given to an interpretation of a regulation. In fact, in both *Cleveland Indians* and *Auer*, this Court specifically discussed the language of the statutes at issue, found them to be ambiguous and then went on to discuss the language of the regulations at issue. *Cleveland Indians*, 532 U.S. at 215-19; *Auer*, 519 U.S. at 457-61. In *Cleveland Indians*, after finding the regulation to be ambiguous, this Court held that because the IRS had consistently and reasonably interpreted these *regulations*, the IRS' "interpretation [of the regulations] attracts substantial judicial deference." *Cleveland Indians, 532* U.S. at 220. Similarly, in *Auer*, this Court held that because the interpretative rule was "a creature of [the agency's] own regulations, [its] interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation,' " the rule was deserving of deference. *Auer*, 519 U.S. at 461. This Court has

consistently distinguished between the deference accorded to an agency's interpretation of a statute and that accorded to an agency's interpretation of its own regulation. The Seventh Circuit has failed to make this necessary distinction.

Moreover, Respondent's position that no such distinction exists underscores the confusion surrounding this subject – *i.e.*, the difference between deference given to an agency's informal interpretation of an ambiguous statute and that given to an agency's informal interpretation of an ambiguous regulation – and suggests that the Petition for a Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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